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No.

IN THE

Supreme Court of the United States

October Term, 1980.

DENNIS FITZPATRICK, *et al.*,
Petitioners,

v.

EDWARD L. KIRKLAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Question Presented.

Whether in a case involving no Title VII claims and no proof of either prior egregious racial discrimination or a compelling state interest, a state may, on solely racial grounds, add a bonus to the scores of minority candidates on a criterion valid civil service promotion examination, bump non-minority candidates who have passed the test from their earned position on the promotion list, deny them promotion and through use of the racial bonus, promote instead minority candidates who received lower scores.

Parties.

Petitioners include, in addition to those named in the caption the following: Frank McDonnell, Bruce Farrell, Thomas Farron, Vincent DiGiorgio, Robert Vercile Rose, Raymond E. Friss and Bruce Meservey.

Respondents include, in addition to those named in the caption the following: Nathaniel Hayes individually and on behalf of all others similarly situated; The New York State Department of Correctional Services; Russell Oswald, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; The New York State Civil Service Commission; Ersa Poston, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; Michael N. Scelsi and Charles F. Stockmeister, each individually and in his capacity as Civil Service Commissioner.

The involvement of the original Intervenors, Albert M. Ribiero and Henry L. Coons has been rendered moot.

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Opinions Below.

The August 18, 1980 opinion of the Court of Appeals is not yet officially reported but is reprinted at 23 F.E.P. 1217, and is appended to this Petition as Appendix "A."

The January 21, 1980 decision of the District Court is reported at 482 F. Supp. 1179 and is appended to this Petition as Appendix "B."

The January 21, 1980 order and judgment of the District Court is not officially reported. That order and judgment is appended to this Petition as Appendix "C."

The August 22, 1979 order of the District Court is not reported. The order is appended to this Petition as Appendix "D."

The April 2, 1974 opinion of the District Court is reported at 374 F. Supp. 1361 and is appended to this Petition as Appendix "E."

The July 31, 1974 decree of the District Court is not officially reported but is reprinted in 8 EPD ¶9675 and is appended to this Petition as Appendix "F."

The September 18, 1974 supplemental order of the District Court is not officially reported. The supplemental order is appended to this Petition as Appendix "G."

The August 6, 1975 opinion of the Court of Appeals is reported at 520 F. 2d 420 and is appended to this Petition as Appendix "H."

The August 3, 1975 order on remand is not officially reported. The order is appended to this Petition as Appendix "I."

The December 10, 1975 Court of Appeals order denying a rehearing is reported at 531 F. 2d 5 and is appended to this Petition as Appendix "J."

The denial of Respondents' petition for a writ of certiorari from the first Court of Appeals decision is reported at 429 U. S. 823 (1976).

The denial of Respondents' motion for a rehearing on that Petition is reported at 429 U. S. 1124 (1977).

Jurisdiction.

The Court of Appeals entered judgment August 18, 1980. October 31, 1980, Mr. Justice Marshall signed an order extending time for filing this Petition until December 17, 1980. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

Constitutional Provisions, Statutes and Regulations Involved.

The relevant constitutional provisions, statutes and rules and regulations are: United States Constitution Fifth and Fourteenth Amendments; 42 U. S. C. §§ 1981 and 1983; Equal Employment Opportunity Commission on Employee Selection Procedures; 29 C. F. R. 1607 §§ 14(8) (a) and 14(8) (d); New York State Constitution Article V, (6) which are set out *seriatim* in Appendix M.

Statement of the Case.

I. Introduction.

Petitioners are Correction Officers in the New York State Department of Correctional Services and have all

successfully passed a criterion validated civil service examination for promotion to Correction Sergeant. They have nevertheless been denied appointment because a racial bonus of 250 points added to the examination scores of all black and hispanic candidates moved some minority candidates with lower test scores ahead of petitioners. The petitioners have intervened and seek certiorari to review and set aside the minority bonus.

II. History of the Litigation.

This action was originally commenced in 1973 under 42 U. S. C. §§ 1981 and 1983 by black and hispanic applicants for the position of Correction Sergeant in the New York State Department of Correctional Services who alleged that their rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution had been violated by the 1972 Civil Service Examination 34-944 which unlawfully discriminated against their racial group.

The United States District Court for the Southern District of New York found the examination to be unconstitutional and ordered the New York State Civil Service Commission to construct a non-discriminatory Correction Sergeant's examination to be validated by means of empirical criterion-related validation techniques using the Equal Employment Opportunity Commission Guidelines on Employment Selection Procedure 29 C. F. R. §1607.01 *et seq.* (1970) or as later revised ("EEOC Guidelines") as a model. The court also imposed a racial hiring quota. *Kirkland, et al., v. New York State Department of Correctional Services, et al.*, 374 F. Supp. 1361 (S.D.N.Y., 1974) opinion (Appendix E), decree (Appendix F).

The United States Court of Appeals for the Second Circuit in *Kirkland, et al., v. New York State Department of*

Correctional Services, et al., 520 F. 2d 420 (2nd Cir.1975) (Appendix H), affirmed that part of the District Court decision holding the examination unconstitutional and imposing a racial hiring quota for interim hiring while a permanent selection procedure was being developed, *id.* at page 431, Appendix H-20; but finding insufficient proof of a clear-cut pattern of long continued egregious racial discrimination and substantial evidence of reverse discrimination, *id.* at page 427, Appendix H-13, the Court reversed so much of the District Court's order as provided for a permanent racial hiring quota, *id.* at page 431, Appendix H-20.

Plaintiffs' petition for a rehearing was denied by the Court of Appeals. *Kirkland, et al., v. New York State Department of Correctional Services, et al.*, 531 F. 2d 5 (2nd Cir. 1975) (Appendix J). Plaintiffs then filed a petition for a writ of certiorari which was denied 429 U. S. 823 (1976), as was their motion for rehearing on that petition, 429 U. S. 1124 (1977).

Under the supervision of the District Court a new promotion examination (No. 36-435) was constructed and administered to all applicants for promotion to Correction Sergeant. It is this second examination, No. 36-435, which is the subject of this petition.

After the new examination 36-435 was administered and when it was announced that a racial bonus of 250 points was to be added to the composite test scores of all black and hispanic applicants, petitioners moved to intervene under 42 U. S. C. §§ 1981 and 1983 and 28 U. S. C. §§ 1343(3) and (4) alleging in their complaint that the procedure violated their rights under the Fourteenth Amendment to the United States Constitution, 28 U. S. C. §1331; New York State Constitution, Article V, Section 6, New York Civil Service Law and the Rules and Regulations

pursuant thereto. Petitioners alleged that the use of a racial bonus constituted a distinction based upon race in violation of their Equal Protection rights and their right to a merit-based selection guaranteed by the New York State Constitution, the New York State Civil Service Law and the Rules and Regulations promulgated thereunder.

The District Court granted intervention (Appendix C-4) but granted summary judgment against intervenors, deciding that the 250 point racial bonus met EEOC Guidelines and that New York State Law was not offended by the process. The Court totally ignored the petitioners' allegations that their due process and equal protection rights had been violated, *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 482 F. Supp. 1179 (S.D.N.Y. 1980) (Appendix B).

On appeal by the petitioners to the United States Court of Appeals for the Second Circuit, the Court of Appeals upheld the District Court's summary disposition. *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 23 F. E. P. 1217 (2nd Cir. 1980) (Appendix A). In upholding the District Court's determination the Court of Appeals reaffirmed its earlier determination that "no one should be 'bumped' from their position on an eligibility list solely because of his race." *Id.* at page 1219; Appendix A-7, but then proceeded to approve a 250 point racial bonus which does exactly that.

III. Facts.

After the Court of Appeals affirmed that the original examination (34-944) was unconstitutional as violative of the due process and equal protection rights of the original plaintiffs, and after this Court had denied the original plaintiffs' petitions for certiorari and rehearing, the duty

of constructing a new and valid promotion examination was undertaken by the New York State Civil Service Commission.

The work of the Civil Service Commission was under the supervision of the District Court and was subject to the mandates of the Court of Appeals decision. That Court had affirmed the original District Court ruling that the new examination should be constructed using empirical criterion-related validation techniques in accordance with the EEOC Guidelines and that such validation method should be used only "insofar as possible" having due regard for the problems peculiar to civil service testing. *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 520 F. 2d 420, 426 (2nd Cir. 1975); Appendix H-11.

In the course of its opinion, the Court of Appeals succinctly and correctly stated the law as laid down by this Court in the following language:

> "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society."

Id. at page 427, Appendix H-12.

The Court went on to say, *id.* at page 428, Appendix H-14-15:

> "Once defendants have prepared a court approved job related civil service examination, a deliberate misuse of the resultant eligibility list on racial grounds would seem to be violative of both the New York and the Federal Constitutions.
>
> Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case it was the spoils system; in the latter,

> discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution. In so doing, they 'declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service' and that merit must be ascertained as far as practicable by competitive examination."

Finally, the Court of Appeals said, *id.* at page 429, Appendix H-16:

> "So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be 'bumped' from a preferred position on the eligibility list solely because of his race. Unless the Fourteenth Amendment is applicable only to Blacks, this is constitutionally forbidden reverse discrimination."

In proceeding with the construction of a new examination, the New York Civil Service Commission conducted an extensive analysis of the job of Correction Sergeant and Correction Officer identifying the five job dimensions for Sergeant and developed from that analysis criterion measures for the job of Correction Sergeant. A two part test was developed consisting of a multiple choice written examination and a combination oral test and performance evaluation procedure. The multiple choice written test aimed directly at the job dimensions identified by the job analysis. Following this extensive and painstaking preparation the entire package was submitted to the parties and to the Court for review prior to the administration of the examination. The examination was administered on October 5, 1978. In addition to administering the written test and the supervisory evaluation to the candidates, incumbent Correction Sergeants were also required to take the test and undergo an evaluation by their supervisors.

A copy of the notice of examination is attached to the petitioners' complaint, Exhibit A, Appendix K-49, and a copy of the instructions and manual for the performance raters is also attached to the petitioners' complaint, Exhibit B, Appendix K-55. As is shown by the last document, there were only four areas considered in the performance evaluation. The raters were ordered to assign scores divisible by the number 5 and in no event lower than 50 or higher than 100 and in any event divisible by the number 5. In addition they were emphatically cautioned that any candidate who scored less than 70 on any one of the four dimensions of the performance evaluation would fail the entire examination since it was required that the candidate pass all four dimensions of the performance evaluation with a grade of 70 or higher in order for the written test to have any weight whatsoever. In addition, the raters were advised that any rating of less than 70 or more than 90 must be supported with comments relating to the performance of the ratee. There were two raters for each candidate and the raters were instructed that if they disagreed on the rating for any individual in any of the four categories their rating form would be returned to them for discussion, comments and possible revision of their ratings so that they would agree. If the final difference was more than 5 points the difference would require justification with supporting comments and discussion.

Since the raters were all current or previous supervisors of the applicants being rated and in most cases would continue to work in close proximity to the individual applicants, it is difficult to imagine how, short of a direct order, the employer could have more clearly mandated that applicants be rated not lower than 70 nor higher than 90.

The written tests were scored and the results of that portion and the performance evaluation incorporated into a composite score. The data was analyzed. The resultant

report entitled "Correction Sergeants Selection System: Validity and Ethnic Effect" was submitted to the Court and as is stated by the State's expert, Kenneth Siegal, the "Correction Sergeant selection measures are criterion valid in that significant correlations exist between the selection composite scores (weighted sum of performance dimension ratings and written test) and composite criteria." Appendix L-3. (Emphasis added, see also the Siegel affidavit of October 16, 1979, ¶¶1, 8a and 8c, where Siegal repeats his assertions of criterion validity.) The term "composite criteria" as used by Siegal denotes the four question performance evaluation. Siegal was the expert primarily relied upon by the State, the original petitioners, the District Court and the Court of Appeals in their determination.

Simply stated, comparison of the composite test score (the combination of the performance evaluation and the multiple choice test) with the results of the performance evaluation only, for both the incumbent sergeants group and the applicants as a whole, demonstrated that the examination validly tested comparative capacity of the individuals involved to perform the job of Correction Sergeant. It was criterion valid.

However, despite this finding and according to the Civil Service Commission, as a part of criterion validation, the Commission applied a separate provision of the EEOC Guidelines which calls for analysis of an examination for what was formerly called "differential validity" but is now called "unfairness" under the 1978 EEOC Guidelines. For a definition see Appendix M-5. While the EEOC Guidelines make an unexplained and unconvincing claim that "differential validity" and "unfairness" are not identical, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290, 38294 (1978), Siegal, appears to regard them as identical (Appendix L-3) as do the courts below.

To determine whether the examination was "unfair" the "composite test scores" for each applicant who received the same performance evaluation rating, were grouped by racial identity. For example, the composite scores of those minority applicants who received 85 on the performance evaluation were compared with the composite scores of those non-minority applicants who received 85 on the performance evaluation. By this process it was found that minority applicants scored on an average, 268 points less on the "composite test score" than non-minorities who had the same performance evaluation rating.

The four dimensions contained in the performance evaluation, were no more and no less job related than the questions on the written examination. However, the scoring system on the performance evaluation contained unlimited potential for racial and other bias, either conscious or subconscious. There was no valid reason to discredit the written examination while according absolute faith to the subjective performance evaluation.

When the same analysis was performed on the two racial groups of incumbent sergeants who took the examination, no comparable variation was identified.

The Guidelines define "unfairness" in 29 C.F.R. §1607.14 (8) (a) (1978):

> "(a) *Unfairness defined.* When members of one race, sex or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores." (Emphasis added.)

Based on these findings, the Civil Service Commission decided the examination was unfair and added a "fairness bonus" of 250 points to the score of every minority applicant. The "fairness bonus" was based upon an application of EEOC Guidelines §1607.14 (8) (d), which provides:

> "(3) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected." (Emphasis added.)

The adjustments were made despite the fact that it had been found that the composite of the written test and the performance evaluation measured *significant job related* criteria—the court mandated standard of criterion validity.

The Siegal affidavit (Appendix L) must be carefully analyzed in order to evaluate his methodology. He points out that Appendix L-9, Exhibit A in the column UROT V. 21214 at level .139, the non-minorities had an average composite score of 7923 while the blacks and hispanics had an average score of 7647. He neglects to point out that while the non-minority group on the average scored considerably higher than the minority group at most levels, this was by no means universal. For example, in column UROT V. 21214 at level -.415 the non-minority group scored only 9 points higher than the minority group. While

in column 76 SGCMP V. 2-21214 at level -.138, the minority group scored 179 points more than the white group and at level -1.246 the minority group scored 56 points higher than the white group.

Siegal states in his affidavit that he did not consider any group containing less than two individuals in his statistical studies. As Exhibit A reveals, some of these exluded groups were as large as 133. Therefore, it is obvious that for at least some groups there were minority candidates who finished ahead of some of the non-minority candidates to the end that Siegal's methodology substitutes a faceless statistical average for the individual rights and merits of the applicants.

All of the petitioners being non-minority Correction Officers who passed Civil Service Examination No. 36-435 were "bumped" from their position on the eligible list by the awarding of the 250 point bonus to minority candidates on strictly racial gounds. Petitioners earned their numerical standing on the eligible list by competing on a criterion validated test. None of the petitioners have been promoted to sergeant. Some of the petitioners have been deprived of promotion to the sergeant position which they otherwise would have already received while for all of the others, the racial bonus has greatly reduced or altogether eliminated the possibility that they will be reached for promotion at any time during the life of the eligible list.

After a diligent effort, the parties were unable to cite to the court below any case authority that allowed the addition of a racial bonus to scores on a criterion valid examination. The ony authority cited to the District Court approving of the use of a racial bonus was a letter from the *Equal Employment Opportunity Commission itself* saying that in their opinion the procedure was justified under the EEOC Guidelines.

The District Court held that the addition of the 250 point racial bonus to the score of each minority test taker was not a quota because the plan approving the adjustment did not establish a fixed number of minority members to be promoted. The Court never addressed the fact that the racial bonus was a distinction based solely upon race, it ignored the petitioners' claim that the racial bonus deprived them of their right to a merit-based test guaranteed by the New York State Constitution and Civil Service Law and that the racial bonus deprived them of their due process and equal protection rights guaranteed by the United States Constitution.

On appeal, petitioners argued that under *University of California Regents v. Bakke,* 438 U. S. 265 (1978), any line drawn on the basis of race or ethnic status must be examined with strict scrutiny and that when such a test is applied, before the distinction will be upheld there must be a showing of a compelling state interest, a history of past discrimination and a showing that a discrete group of innocent persons are not bearing the burden of an otherwise benign program. The petitioners pointed out that there had been no showing of any compelling state interest, that the Court of Appeals had specifically noted the paucity of proof of any past history of discrimination and that innocent Correction Officers who in no way discriminated against the respondents were being forced to bear the burden of the program.

The petitioners also asserted that despite the fact that the EEOC Guidelines were applied, the case was brought under the Due Process and Equal Protection clauses of the United States Constitution and not under Title VII of the 1964 Civil Rights Act and that petitioners were asserting their rights under the same constitutional provisions. The Constitutional standard for measuring discriminatory impact of examinations was set forth in *Washington v.*

Davis, 426 U. S. 229 (1976), which held that a criterion validated examination, which the examination at bar was found to be, is not invalid merely because it affects a greater proportion of one race than another. A criterion validated examination is all that is required. The Constitution does not guarantee equal results.

The Court dismissed the petitioners' argument that *Washington v. Davis,* 426 U. S. 229 (1976), controlled this case by saying "it is settled law of this case that the sergeant's test which Test No. 36-435 replaced was discriminatory." *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 23 F. E. P. 1217, 1218, n. 2 (2nd Cir. 1980) Appendix A-6. The statement begs the issue. There is no question regarding the first examination. The question is whether the second examination violates the rights of the petitioners.

The petitioners argued that a racial bonus was a "de-facto quota" based solely on race disguised by testing jargon, and that it was added without any showing of a compelling state interest, a prior history of past discrimination or inquiry into the adverse impact on a discrete group of innocent persons.

The Court of Appeals held that the racial bonus was not a quota and did not constitute reverse discrimination even though it stated, "[o]f course, the 250-point differential does operate to favor minority test-takers, if one assumes that the multiple-choice written portion of the exam is a truly objective measure of qualities important to success as a correction officer." *Id.* at page 1219, Appendix A-7. It justified the racial bonus by referring to the State's interest in non-discriminatory hiring in correctional institutions. *Id.* at page 1219, Appendix A-8. This reference to a State interest in the Court of Appeals' record opinion came despite the fact that the first time any indication of a state

interest was ever discussed was in an appendix to the brief submitted by the respondents in the record on appeal to the Court of Appeals.

The Court also held that the petitioners' arguments opposing the racial bonus were foreclosed by the Court's earlier decision. The Court based this on an incorrect finding that an examination is not criterion valid until an "unfairness" test had been applied and scores were adjusted on the basis of that unfairness test. *Id.* at page 1219, Appendix A-8. This came despite the agreement of both the District Court and the parties that an "unfairness" test is separate and distinct from a determiation of criteron validity. There has never been any question that Civil Service Test No. 36-435 was criterion valid before the racial bonus was added. Ultimately, however, the simple answer to this erroneous reasoning is that at the time of the first Court of Appeals decision, petitioners, had they then been in the case, had no conceivable way of knowing how the EEOC Guidelines would be applied. At that time, for all anyone knew, a test might be constructed without any question of unfairness ever arising. It is the manner of the application of the EEOC Guidelines in the particular facts of this case as they have developed since the first Court of Appeals decision to which petitioners object. Indeed, the issue would have been premature and unripe if it had been raised earlier.

The petitioners also argued that even if Title VII standards were applied, *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975), requires only a criterion valid examination absent a showing of past egregious racial discrimination. The Court of Appeals did not discuss this argument.

The petitioners asserted that by using the subjective evaluation ratings to measure "unfairness" and justify the racial bonus the results of the objective written portion of the examination were disregarded for minority applicants in violation of the New York State Constitution.

In addressing the question of whether the racial bonus deprived the petitioners of their right to an objective merit-based examination the Court never reached the question of New York Constitutional law or whether the rights of petitioners could be preserved while enforcing the rights of the minority applicants. The Court dismissed the petitioners' arguments holding that the racial bonus was imposed to remedy a violation of the United States Constitution which, therefore, was a matter of federal law under the Supremacy Clause. The Court did say that:

> "Indeed, since the effect of the 250-point differential is to bring the average minority applicant's total raw score up to the level of non-minority test-takers with equal job performance ratings, it can be argued that—at least insofar as deviations from the average are disregarded—the results of the written portion of Test No. 36-435 are entirely superfluous when minority applicants are involved. Kirkland v. New York State Department of Correctional Services, 23 F. E. P. 1217, 1219 (2nd Cir. 1980), Appendix A-9. (Emphasis added.)

Reasons For Granting Certiorari.

I

The Court granted certiorari in *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975), to resolve the confusion concerning "the showing required to establish the 'job relatedness' of pre-employment tests." In so doing, this Court reaffirmed the ruling in *Griggs v. Duke Power Co.,* 401 U. S. 424, 436 (1971), that an employment test must be "[d]emonstrably a reasonable measure of job performance."

To resolve the confusion concerning what showing is required to establish job relatedness, this Court endorsed the use of the EEOC Guidelines then in effect, stating:

> "The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 C. F. R. §1607.4(c)." *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 431 (1975).

The EEOC Guidelines in effect at the time of the Court endorsement contained a provision for reporting data separately for minority and non-minority groups. EEOC Guidelines 29 C. F. R. §1607.5(a) (1974). The concept involved "different validation." This Court in endorsing the EEOC Guidelines directed that the "differential validation" should be applied if technically feasible. *Id.* at page 435. But there was no comment on what the results of the "differential validation" study could be used for or how they should be used.

Subsequent to the decision in *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975), the EEOC Guidelines were revised. 29 C. F. R. §1607.1 *et seq.* (1978). The revisions included provisions dealing with "unfairness," which replaced the earlier provisions for "differential validation."

This court has never determined the extent to or the way in which differential validation may be used and has never had occasion to even consider the so called "unfairness" doctrine. Even more important, no case in this Court involving enforcement of the Fifth and Fourteenth Amendment rights of equal protection and due process has ever even considered whether the Constitution guarantees the application of the differential validity or unfairness doctrine. The courts below have held that these EEOC-created concepts of "differential validity" and "unfairness" are Constitutionally guaranteed by holding that even where a test is carefully and painstakingly constructed under Court

supervision and is found to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated," *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 431 (1975), if competing racial groups do not achieve identical rates of success on the examination, a racial bonus will be awarded to guarantee equality of results.

Examination of the basis for and reliability of "differential validity" and "unfairness" reveal that the concepts are not only controversial and uncertain (facts which the experts relied on by the plaintiffs, the State and the courts below concede) but have also been soundly rejected by leading experts in the field of psychological testing.

The maximum possible score on 36-435 was 8830, Siegal, Appendix L-7. Siegal's affidavit, sworn to December 3, 1979, states in paragraph 8 that "the average difference between white [and] minority scores across all levels of performance is 268." His affidavit discusses how the racial bonus of 250 points was arrived at and explains that, "[t]he adjustment should be somewhat conservative to allow for the statistical or psychometric uncertainties in the data . . . and to avoid over-correcting for the observed differences." Stripped of the jargon, Siegal is admitting that the racial bonus is based on uncertainties and is an approximation.

Richard S. Barrett, a testing expert who testified on the trial for the plaintiffs also submitted an affidavit, sworn to December 7, 1979, in support of the motion for summary judgment. Barrett participated in the drafting of EEOC Guidelines. His affidavit mentions and contains his publication entitled, *"Statistical Diagrams"* produced sometime since March, 1978. In discussing "unfairness" in that document he says:

> "The debate over the existence of unfairness has been with the profession for at least 10 years, and will probably continue for a long time. For example, the Spring 1976 issue of Journal of Educational Measurement was devoted entirely to articles on bias in selection, without resolving the problems of the definition of selection bias, much less settling issues about its nature and extent."

In summary his document says:

> "The variations in test scores, performance measurements, and validities are endless. Further, the effect of a given selection procedure depends on how it is used, and how it relates to other selection procedures used in conjunction with it. These complexities, along with the difficulty in arriving at a socially, politically, and statistically acceptable definition of fairness will keep the debate alive for a long time to come." (See affidavit of Richard S. Barrett, December 7, 1979.)

This is hardly a convincing endorsement of the validity or accuracy of a concept being used to violate petitioners' rights to equal protection.

Other experts in the field of psychological testing have rejected the concepts of unfairness and differential validation as "statistical artifacts" with no sound basis in supporting facts. Schmidt and Hunter, The Future of Criterion-Related Validity, 33 Personnel Psychology 41, 53-54 (1980); Campbell, An Investigation of Sources of Bias in the Prediction of Job Performance, a Six Year Study, Educational Testing Service, Princeton, New Jersey, P. R.-73-37 (September, 1973); APA Task Force on Employment Testing of Minority Groups, Job Testing and the Disadvantaged, 24 Am. Psych. 637, 641 (1969).

Legal commentators have voiced similar concerns that the concept upon which differential validity and unfairness are based has no sound basis in proven fact. Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1129 (1971); Ruch and Ash, Comments on Psychological Testing, 69 Colum. L. Rev. 608, 611 (1969).

Even the drafters of the EEOC Guidelines themselves recognize that the validity of the concept of "fairness" is open to serious debate. An overview of the Uniform Guidelines on Employment Procedures, 43 Fed. Reg. 38290, 38,294 (1978).

This criticism has been reflected in the decisions of the courts when commenting on "differential validity." *Vulcan Society of New York City Fire Dept., Inc. v. Civil Service Commission,* 490 F. 2d 387, 395, n. 10 (2d Cir. 1973); *United States v. Georgia Power Company,* 474 F. 2d 906, 914 (1973). In fact, the court in *Georgia Power Company* recognized the serious scientific problems inherent in a "differential validity" study. It directed that the differential validity study be undertaken because "the safest validation method is that which conforms with the EEOC Guidelines." *Id.* at page 914.

Mr. Chief Justice Burger cautioned against a slavish endorsement of the EEOC Guidelines:

> "Such comment would not be a mere formality in light of the fact that many of the EEOC Guidelines are not universally accepted. For example, the Guideline relating to 'differential validation,' upon which the Court relies in this case, *ante,* at 435, has been questioned by the American Psychological Association." *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 452, n. 3 (1975).

New York State Civil Service Examination No. 36-435 for promotion to Correction Sergeant was tested by the New York State Civil Service Commission for criterion validity and was found to be criterion valid as "significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Appendix L-3.

Despite the finding of criterion validity the unfairness provisions of the EEOC Guidelines were applied based opon a procedure which gave primacy to an obviously subjective performance evaluation carved out under rigid instructions heretofore discussed which virtually required the raters to pass the applicants and to agree in their ratings. The courts below have thus held that under the United States Constitution no objective, written, job and merit related civil service examination can ever be valid if it disagrees with the ratings developed from a subjective performance evaluation.

The Court of Appeals decision has thus dramatically expanded the scope of the endorsement this court has given to the use of the EEOC Guidelines. In *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 417 (1975), this Court reiterated its holding in *Griggs* regarding the purposes of Title VII:

> "As the Court observed in *Griggs v. Duke Power Co.*, 401 U. S., at 429-430, the primary objective was a prophylactic one.
>
> 'It was to achieve *equality of employment opportunity* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.' "

This Court has made it clear that their endorsement of the EEOC Guidelines was meant to guarantee equality of opportunity, by requiring a job-related examination. By

using the EEOC Guidelines to justify a 250-point racial bonus added to the score earned on an already criterion valid examination, the Court of Appeals has directed that an employment test must guarantee "equality of results" a step which ultimately denies equality of opportunity to non-minorities.

The Court of Appeals has approved a slavish and unthinking application of the EEOC Guideline provisions dealing with "differential validity" or "unfairness" without meaningful inquiry into the constitutionality of their application relative to applicants discriminated against by the racial bonus.

This Court has never endorsed the concept of "unfairness" which was added to the EEOC Guidelines after the *Albemarle* decision nor has it even examined the question of what may be done when "unfairness" is found without violating the Equal Protection rights of all test takers.

The EEOC Guidelines are referred to by hundreds of employees, both public and private, who are attempting to design effective, non-discriminatory tests based on merit. Those examinations impact millions of citizens including over 2,000 people on the eligibility list in question.

The number of employers and employees who are affected by the EEOC Guidelines establishes the need for a clear and final determination of what an employer must do to validate an examination without which employers will continue to be flooded with lawsuits from both minorities and non-minorities. Tens of thousands of individual employees will have the determination of their employment status placed in doubt and delayed for prolonged periods to say nothing of the wage loss to employees who are wrongfully denied employment or promotion.

The fact that the concepts of "unfairness" and "differential validation" have been soundly criticized adds further urgency to this Court's review.

This holding that to be valid a civil service promotion test must not only be job related, but must also pass a test of "unfairness" is a dramatic departure from this Court's decision. The Court of Appeals has imposed a requirement of equality of results in direct contravention to this Court's prior holdings. *Personnel Administration of Mass. v. Feeney,* 422 U. S. 256, 273 (1979).

We submit that while use of the unfairness doctrine of the EEOC Guidelines may be financially "safe" for employers and competitively advantageous to the plaintiffs, the technique is not guaranteed by the United States Constitution and as applied herein violates petitioners' constitutionally guaranteed equal protection rights.

The constitutional guarantee of equal protection is the pledge of America to each individual. It is well established that this guaranty runs to each *individual* citizen and is not limited in its application to broad faceless ethnic, religious or racial groups. *Shelley v. Kraemer,* 334 U. S. 1 (1948).

The courts below in their zeal to dispose of an old and troublesome case have failed to consider the precious rights of the individual petitioners.

II.

This Court considered the legal limits of minority preferences in *University of California Regents v. Bakke,* 438 U. S. 265 (1978). There, all five of the Justices who reached the question of whether Alan Bakke's Equal Protection rights were violated applied a standard of at least "strict" and "searching" scrutiny of racial classifications. A majority of the Court held that before a racial classification will be upheld an *important* and *articulated* purpose for its use must be shown.

Mr. Justice Powell wrote that, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at page 291. He continued saying, "[w]e have held that in 'order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment' of its purpose or the safeguarding of its interests." *Id.* at page 305.

Here, the Court of Appeals ignored petitioners' claim of an Equal Protection violation and held that a 250-point bonus added solely on a racial basis to the scores of an already criterion validated test was not a quota and was, therefore, lawful. *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 23 F.E.P. 1217 (2nd Cir. 1980), Appendix A.

The Court of Appeals did not apply the "strict" or "searching" scrutiny test to the racial bonus but erroneously based its decision on a semantic but legally and practically meaningless distinction between a quota and a bonus in direct contravention of *University of California Regents v. Bakke,* 438 U. S. 265 (1978). Indeed, the Court of Appeals totally denied petitioners their right to an adjudication of their constitutional rights to equal protection.

Not without significance is the fact that in this highly dangerous world of the Correction Officer and Correction Sergeant, those black and hispanic individuals who have been or will be appointed with the benefit of the 250 point racial bonus will be stigmatized throughout their correction career as individuals who could not measure up and make it on their own but required a bonus to qualify for appointment.

A clear demonstration of the continuing concern regarding racial preference is found in the recent grant of certiorari in *Minnick, et al., v. California Department of Corrections, et al.*, No. 79-1213, 65 L. Ed. 2d 1139 (1980), which concerns the question of whether a public employer may grant preferences in employment and promotion to racial minorities and women absent any showing of past invidious discrimination. In *Minnick* the employer asserted a compelling state interest albeit an insufficient one.

Here, there is an even stronger case to grant certiorari since there has been no showing of past invidious discrimination, no proof of a compelling state interest requiring a preference and in this case the preference in the form of a racial bonus is being superimposed on the results of an otherwise criterion valid examination.

The Court of Appeals has held that as between races, the Constitution of the United States guarantees equality of results in employment tests without any inquiry into a compelling state interest, history of past discrimination, or adverse burdens on innocent parties or even the comparative performance in the examinations.

III.

Washington v. Davis, 426 U. S. 229, 247 (1976), held that the standard applied for reviewing employment tests in an Equal Protection case is separate and distinct from the standard applied in a case based on Title VII of the Civil Rights Act.

This Court said that in an Equal Protection case:

> "We have not held that a law, neutral on its face and serving ends otherwise within the power of

> government to pursue, is invalid under the Equal Protection Clause, simply because it may affect a greater proportion of one race than of another." *Id.* at page 242.

Neither respondents nor petitioners are asserting Title VII claims herein. The first District Court and Court of Appeals decision directed that a job related examination based on merit be constructed. The direction to use the EEOC Guidelines for validation "insofar as feasible" did not transform this into a Title VII case. Yet, that is precisely what the courts below have done by their approval of a racial bonus generated from a blind pursuit of the EEOC Guidelines without the slightest showing of any intent to discriminate or any past invidious discrimination and in the face of the manifest injury to innocent applicants.

The Court of Appeals approved the racial bonus without any inquiry into an intent or purpose to discriminate as consistently required by this Court in any Equal Protection case. *University of California Regents v. Bakke,* 438 U. S. 265, 289, n. 27 (1978); *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 264-265 (1977); *Washington v. Davis,* 426 U. S. 229, 242 (1976).

The Court of Appeals for the Second Circuit has dangerously distorted this Court's prior holdings requiring express congressional legislation before extending Title VII standards into an Equal Protection inquiry.

The prominence of the Court of Appeals for the Second Circuit precludes any reliance on the thought that its error might go without influence. This Court should grant certiorari to once again reassert the distinction between a Title VII case and one arising under the Equal Protection Clause.

Conclusion.

In light of the continuing controversy surrounding the "unfairness" provisions of the EEOC Guidelines which have never been passed upon or applied by this Court, the importance of the individual rights involved, the large number of parties whose rights are impacted by this issue and the conflict of the decision of the United States Court of Appeals for the Second Circuit with decisions of this Court, it is urgent and important for this Court to grant certiorari and decide whether the EEOC Guidelines on "unfairness" are applicable in a case involving solely constitutional issues and whether, as part of the validation process the unfairness concept can be utilized to add a bonus awarded purely on a racial basis to the scores of minority candidates even though the racial bonus will "bump" qualified individuals from their merit-earned position on a civil service promotion list.

Respectfully submitted,

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80-992

No.

IN THE

Supreme Court of the United States

October Term, 1980.

DENNIS FITZPATRICK, *et al.*,
Petitioners,

v.

EDWARD L. KIRKLAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' APPENDIX.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1127—September Term, 1979

(Argued April 28, 1980 Decided August 18, 1980)

Docket No. 80-7129

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellees.

—and—

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, THOMAS FARRON, VINCENT DiGIORGIO, ROBERT

VERCILE ROSE, RAYMOND E. FRISS, and BRUCE MESERVEY,

Intervenors-Appellants.

Before:

LUMBARD, VAN GRAAFEILAND, and KEARSE,
Circuit Judges.

The District Court for the Southern District, Lasker, *J.*, granted summary judgment against intervenors, who had filed a complaint alleging that an examination given to corrections officers seeking promotion to the rank of sergeant violated their rights under 42 U.S.C. § 1983.

Affirmed.

JEFFREY G. PLANT, ESQ., Albany, New York (Rowley and Forrest, P.C., Albany, N.Y., Richard R. Rowley, Esq., of counsel), for Intervenors-Appellants Fitzpatrick, et al.

JUDITH REED, ESQ., New York, N.Y. (Jack Greenberg, Esq., O. Peter Sherwood, Esq., New York, N.Y., of counsel), for Plaintiffs-Appellees.

JUDITH A. GORDON, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman,

Assistant Solicitor General, New York, N.Y., of counsel), for Defendants-Appellees.

LUMBARD, *Circuit Judge*:

This is an appeal taken by intervenors, incumbent corrections officers employed by defendants, New York State Department of Correctional Services, challenging the lawfulness of the methods of testing and scoring developed by the defendants, pursuant to court order, for use in making promotions to the rank of corrections sergeant. Intervenors seek to enjoin promotions made on the basis of the disputed test; defendants and plaintiffs in the underlying discrimination suit approved of the test and sought summary judgment against intervenors. The District Court for the Southern District, Lasker, *J.*, granted summary judgment against intervenors. We affirm.

The Department of Correctional Services makes permanent appointments to the rank of sergeant by means of competitive examination. In 1974, in a suit brought by black and hispanic corrections officers, Judge Lasker found that the test from which promotions to sergeant were being made at that time was discriminatory. *Kirkland v. New York State Department of Correctional Services*, 374 F.Supp. 1361 (S.D.N.Y. 1974). We affirmed, 520 F.2d 420 (2d Cir. 1975). In our opinion, we spelled out the relief appropriate, which included the administration of a new, non-discriminatory test to be "validated in accordance with the E.E.O.C. Guidelines on Employ-

ment Selection Procedures," *id.* at 426 and we ordered that "the new testing procedures be validated by means of empirical criterion-related validation techniques if feasible." *Id.* at 431.

Pursuant to our directives, the Department developed Test No. 36-435. This examination consists of two parts: a written multiple-choice portion in which test-takers are asked to answer questions relating to the work of a corrections officer; and a set of "performance ratings" made by the test-taker's departmental superiors who have observed the candidate's on-the-job performance. The "performance ratings" are given in four major areas, and the candidates are assigned a numerical grade depending on how closely their performance meets, in the rater's view, the standards set out in paragraph-long descriptions of varying levels of job competence. For example, when rating an applicant's record in "Taking effective, positive direct action in security situations," one of the four major areas graded, the standards range from:

> Is alert and active in searching out and preparing for potential incidents. Acts efficiently and positively in taking charge at the scene of a disturbance . . .

to

> He misappraises the security implications of situations. Does not take charge in situations which clearly call for it . . .

When a grader gives a particularly high or low grade (the examples given above represent opposite ends of the spectrum), he must provide additional explanation. Each applicant is graded by two different evaluators in

the performance portion of Test No. 36-435, and if the scores assigned differ significantly, the two graders must explain, in writing, the reasons behind this difference. An applicant can appeal the score he receives in the performance portion of the exam, and if he does so, two other graders will be assigned to perform a de novo evaluation.

In December, 1978, Test No. 36-435 was given to approximately 2,300 applicants for the rank of sergeant. Pursuant to the district court's decree, a "validation study" was carried out in order to determine if the test would function accurately as a non-discriminatory predictor of on-the-job performance. The methodology employed, which in this respect is not challenged,[1] was to compare the raw scores of applicants—grouped by racial identity—on the performance portions of the exam, to their raw scores on the entire exam, in which the written multiple-choice exam results figured. A disparity of, on the average, 268 points out of a total of 8,830 was discovered. This figure represents the fact that, on average, a black applicant's raw score on the total exam was 268 points lower than that of a white applicant, in a case where both black and white applicants had scored equally well in the performance rating portion of the exam. In order to "validate" Test No. 36-435, the Department re-scored

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1 Intervenors do not challenge the mathematical correctness of the statistical analyses upon which the district court's conclusions rest in any way requiring extensive analysis. They argue, for example, that the 250-point figure is imprecise, and benefits disproportionately those minority group members who scored relatively well on the written portion. In our view, it would be impossible to eliminate all possible imprecisions in adjusting scores on an 8,830 point exam, and we do not think the district court erred in holding that these contentions did not raise a genuine issue of material fact.

exam results by adding 250 points to the raw score of every minority group applicant.

Intervenors, who are non-minority test-takers, were granted leave by the district court to file a complaint under 42 U.S.C. §§ 1981 and 1983. They argue that the 250-point bonus is tantamount to a quota illegal under federal and state law and that the test violates New York's Civil Service laws. Judge Lasker granted the motion for summary judgment against intervenors made by plaintiffs and defendants.

We affirm. The intervenors raised no triable issues of material fact regarding Test No. 36-435, and we agree with the district court's conclusions of law.

Appellants are entirely misguided in arguing that the 250-point differential is a quota,[2] for it does not require that a minimum number of sergeant appointments be given to any members of a minority group. To the extent that appellants' argument is directed toward the fundamental fairness of the 250-point adjustment, we note that the district court found that the differential was necessary to prevent future discrimination of the kind found to have existed earlier in this case. Without the 250-point correction, the new test—like its predecessor—would not be "valid", since it would not serve as a race-neutral predictor of on-the-job performance. Contrary to appellants' interpretation, the E.E.O.C. guidelines recognize the possibility that a point correction to raw scores should be made in some

---

[2] Intervenors also argue that *Washington v. Davis*, 426 U.S. 229 (1976), precludes a finding that a racially neutral exam is discriminatory based solely on disproportionate racial impact. Whatever the merits of this argument, it is settled law of this case that the sergeant's test which Test No. 36-435 replaced was discriminatory.

situations, *i.e.*, "to assure compatibility between the probability of succcessful job performance and the probability of being selected." [3] 29 C.F.R. § 1607.14 (B)(8)(d).

Appellants also argue that the 250-point differential is "reverse discrimination" in violation of part of our holding in the earlier appeal in this case, 520 F.2d 420 (2d Cir. 1979). In that opinion we said that "no one should be 'bumped' from a preferred position on the eligibility list solely because of his race." *Id.* at 429. Although we do not discount the continuing validity of this statement, we observe that its context demonstrates that it was directed primarily to the question of minority group quotas for promotions. *Kirkland* forbade such quotas and, as we have said above, the steps taken by the Department at issue in this case do not constitute de jure or de facto quotas. This program does not bump white candidates because of their race but rather re-ranks their predicted performance as estimated by the combined test score and job performance ratings. Finally, our previous opinion approved a broad range of affirmative action relief, including quotas in *interim* appointments, *id.* at 429-430, and made a distinction between quotas in initial hiring decisions and in promotions.

Of course, the 250-point differential does operate to favor minority test-takers if one assumes that the multiple-choice written portion of the exam is a truly objective measure of qualities important to success as a corrections officer. But even if "[s]ome non-minority

---

3 We do not mean to imply that the EEOC Guidelines must be followed. *See Guardians Association of the New York City Police Dep't v. Civil Service Commission*, Slip Op. 4755, at 4776-78 (2d Cir. July 31, 1980).

applicants near the cut-off scores of appointment will be effectively denied employment owing to the elevation of scores of minority candidates," appellants have not cited us to any persuasive authority in federal law that makes such denial illegal. In light of the importance of non-discriminatory hiring in correctional institutions, where a high percentage of the inmates are members of minority groups, the lack of any such prohibition is easily understood.

Moreover, the issue of the 250-point differential is settled by the law of the case doctrine. Our earlier *Kirkland* decision requires any new test "to be validated by means of empirical criterion-related validation techniques if feasible." 520 F.2d at 431. By requiring the use of such techniques we, in effect, foreclosed the argument made now by intervenors. Criterion validation requires the abstracting of job performance characteristics and the rating of employees as to how they measure up to these characteristics. These ratings can then be compared to the performance of applicants who have taken a written exam. If significant variation correlating to racial identity is found in such a comparison, the test fails to be criterion valid. In this case, the abstracting of job performance characteristics and the rating of applicants were performed as part of the examination later validated. Appellants' argument that the 250-point differential constitutes tampering with the results of a valid test thus puts the cart before the horse; the results of the written portion of the exam are not valid until they have been compared to job performance criteria. As the E.E.O.C. guidelines recognize, once the results of such a comparison indicate a discrepancy, the responsible authorities have a choice. They can return to the drawing board and

design a new test meant to correlate to job performance ratings; or they can adjust the test to bring the results into conformity with those ratings. *See* 29 C.F.R. § 1607.14(8)(d). In this case, they chose the latter course of action, an alternative clearly foreseen by our prior opinion.

Appellants' second major group of arguments assert that New York's Civil Service laws and policies prohibit a test that, like No. 36-435, emphasizes subjective job performance evaluation over more traditionally objective varieties of competitive examination, such as written multiple-choice questions. The primacy given the job performance portion of the test cannot be disputed. Indeed, since the effect of the 250-point differential is to bring the average minority applicant's total raw score up to the level of non-minority test-takers with equal job performance ratings, it can be argued that—at least insofar as deviations from the average are disregarded—the results of the written portion of Test No. 36-435 are entirely superfluous when minority applicants are involved. The question that must be answered is whether or not New York law permits appointments to be made on the basis of job performance evaluations. We conclude that it does.

New York law does not reject all means of making civil service appointments differing from the norm of competitive written examinations. The constitutional provision in question, Article V, § 6, reads in pertinent part:

> Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as

> far as practicable, by examination which, as far as practicable, shall be competitive . . .

Interpreting this provision, New York courts have made it clear that the use of the terms "merit and fitness" and "as far as practicable" justify interviews as permissible departures from objective written examinations. *Walker v. Board of Examiners*, 22 Misc.2d 345 (Sup.Ct. N.Y. Co. 1957), *aff'd mem.*, 7 A.D.2d 968 (1st Dept. 1959). Consideration of on-the-job performance as a factor in granting a teacher's license was approved in *Sloat v. Board of Examiners*, 274 N.Y. 367 (Ct. App. 1937). In *Young v. Trussel,* 42 Misc.2d 108 (Sup.Ct. N.Y. Co. 1964), the court approved a procedure whereby applicants for the post of psychologist were not only given a written examination but were assigned a "key rating" score based on certain numerical values attached to past experiential and educational qualifications. In *Shanley v. Leonard*, 87 Misc.2d 915 (Sup.Ct. Nassau Co. 1976), the court approved a system whereby promotions were made by written exam supplemented by scoring differentials giving candidates additional credit for past departmental commendations. *See also Bobrowich v. Poston*, 52 A.D.2d 478 (3d Dept. 1976); *Chance v. Board of Education*, 496 F.2d 820, 824 (2d Cir. 1974).

Appellants rely on two cases which invalidated, respectively, the 1961 and 1963 exams given to state police officers for promotion to police sergeant. *Donohue v. Cornelius*, 39 Misc.2d 539 (Sup.Ct. Albany Co. 1963); *Donohue v. Cornelius*, 22 A.D.2d 1000 (3d Dept. 1964). Both tests included a written component, a performance evaluation component, and an oral exam. The first *Donohue* opinion explained:

> An examination cannot be classed as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed, when necessary, by other examiners of equal ability and experience.

39 Misc.2d at 541-542. The court noted, in invalidating the 1961 exam, that the oral portion of the exam included questions about the applicant's subjective beliefs and attitudes. The second *Donohue* opinion pinpointed as objectionable the use of performance ratings that, instead of being aggregates accumulated over time as part of a service record, were arrived at "specifically for purposes of the examination, by a rating board guided only by general standards." 22 A.D.2d at 1001.

We think both cases are distinguishable from the case at bar. No candidates taking Test No. 36-435 were asked questions regarding their personal beliefs or attitudes. And although the performance ratings were not part of an ongoing service record, the standards used by the raters were not "general standards," as prohibited by *Donohue II*, but specific and detailed ones, each running to a paragraph of terse, descriptive prose.

In our view, the key to determining whether an examination is objective enough to qualify as within New York's civil service law was stated in that portion of the *Donohue I* opinion quoted above, and in *Fink v. Finnegan*, 270 N.Y. 356, 362 (Ct.App. 1936). The guiding principle established in these cases is the reviewability of the exam. In the case of Test No. 36-435, officers who perform the evaluations must provide written explanations for high and low ratings, and

there is a provision for written explanations when the ratings assigned a candidate by his two evaluators differ widely. Where the raters do not disagree, no explanation is required; in such cases the very degree of agreement provides a basis for sustaining the objectivity of the rating. The correlation between the values assigned by the two raters was .80 out of a possible 1.00, a high enough figure to support the district court's conclusion that the ratings were an objective measure of performance. Moreover, the testing procedures allow for appeals, including a de novo second rating by two officers who did not participate in the initial rating, and, of course, an applicant may bring an Article 78 proceeding in state court to obtain judicial review.

Additionally, we note that the use of on-the-job performance ratings as the principal method of making "merit and fitness" appointments to civil service positions is considerably more defensible when the appointment at issue is a promotion rather than an initial hiring. *Cf. Kirkland, supra*, at 429 (distinction between initial hirings and promotions in the context of quotas). Where, as here, each of the test-takers has an on-the-job history that can be evaluated, and where the position he seeks is one requiring qualities similar to those already displayed in the performance of his duties, the argument for reliance on performance ratings is stronger than if this were a case involving applicants for initial appointments.

Finally, appellants challenge the validity of the 250-point differential under state law. Appellees seek to justify the differential under state law by directing our attention to 4 N.Y.C.R.R. § 67.1(g), which allows for differential weighing of test components "for candidate

subgroups, if scores of such subgroups are shown to differ substantially in their relation to measures of performance." Appellants respond that a variation of approximately 250 out of 8,830 points is not "substantial," and that in any event the regulation is inconsistent with Article V, § 6 of the New York Constitution, quoted *supra*, if the regulation is interpreted to allow additions to the scores of members of racial subgroups. We hesitate to say whether, as a matter of law, an approximately 3% variation is "substantial," because the answer may well depend on how test scores bunch together; for example, if most scores fell within 500 points of each other, a 250-point difference would clearly be quite substantial.

We see no need, however, to reach the question of the compatibility of the 250-point addition with the New York Constitution. In this case, a finding of discrimination unconstitutional under the United States Constitution has been upheld on prior appeal, and the power of the district court to fashion a remedy is a matter of federal law under the supremacy clause.

Affirmed.

APPENDIX B--DECISION OF HON. MORRIS E. LASKER, JANUARY 21, 1980.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants,

-and-

ALBERT RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

DENNIS FITZPATRICK, *et al.*,

Intervenors-Defendants.

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LASKER, D.J.

This case has been remanded by the Second Circuit Court of Appeals which affirmed an order of this court enjoining as unconstitutionally discriminatory the promotion of correctional sergeants

based on the results of Examination No. 34-944, and requiring the development of criterion valid testing procedures in accordance with the Equal Employment Opportunity Commission Guidelines on Employment Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq.* (1979) (the Guidelines), *Kirkland v. New York State Dep't of Correctional Services*, 520 F. 2d 420, 431 (2d Cir. 1975).

Plaintiffs and defendants now apply for an order approving the proposed use of Examination No. 36-435 for selection of correctional sergeants. They also move for summary judgment dismissing the Fitzpatrick intervenors' complaint.

The decision whether to grant these requests is based on affidavits submitted by the parties and conferences with the

court on the record in which were set forth the factual details relating to the criterion validity of the examination, its validity under the Guidelines, and the determination to add 250 points to the scores of Blacks and Hispanics. The documentary support includes defendants' report entitled "Correction Sergeant Selection System: Validity and Ethnic Effect"; three affidavits of Kenneth L. Siegal, the Principal Personnel Examiner for the New York State Department of Civil Service, who has a Master's Degree in Educational Psychology and Statistics, and who was responsible for the design and development of the Correction Sergeant Selection System; an affidavit of Richard S. Barrett who was employed by the EEOC to participate in the deliberation of the

staff committee responsible for drafting the Guidelines and their clarifications and to prepare a training program for staff attorneys; a letter dated January 11, 1980 from Leroy D. Clark, General Counsel for the EEOC; and affidavits of correction officers employed by the state who took or administered the examination. The reader is referred to such documents for details relating to the nature of the proposed new examination and the procedures utilized to validate it.

Disposition of both requests for relief turns on resolution of the same issues: that is, whether the proposal meets the requirements set forth in this case by the Second Circuit in its opinion

remanding for determination of an appropriate remedy. For the following reasons, both the application and the motion for summary judgment are granted.

First, there are no genuine issues of material fact which require trial. It is true that the intervenors have submitted a Rule 9(g) statement in opposition to the motion for summary judgment in which they assert numerous propositions which they describe as issues of material fact. However, the intervenors' papers do not allege facts which controvert those stated by plaintiffs and defendants in their 9(g) statement and supporting affidavits. Rather, they merely assert that factual questions exist (*e.g.*, ¶¶ 10, 16[c], 16[e], 16[r]), and challenge the legal conclusions to be drawn from

facts whose truth is not and cannot be challenged (*e.g.*, ¶¶ 5, 7, 12, 13, 14, 15, 16[b]). In sum, the intervenors' papers raise legal issues only, which appropriately should be decided on a motion for summary judgment. Fed. R. Civ. Proc. 56(c).

Second, the proposed examination and addition of 250 points to the scores achieved by Black and Hispanic candidates satisfy the requirements established by the Second Circuit in this case. The intervenors oppose essentially two facets of the proposed order: the addition of 250 points to the scores achieved by minority applicants and the job performance evaluation component of the examination.

The addition of 250 points to the scores of minority applicants is claimed

to establish a quota contrary to the mandate of the Court of Appeals; yet this is simply not true. The proposed plan does not establish a fixed number of minority members to be promoted without regard to the applicants' job performance. The true affect of the addition of 250 points to the scores of minority members will be merely to render the examination procedure balanced, whereas without the adjustment, the validated procedure appears to favor white candidates.

The intervenors further object that the 250 point adjustment violates the EEOC Guidelines.[1/] It is undisputed that since Examination No. 36-435 is highly predictive of job performance for whites, while not as predictive of job performance for Blacks and Hispanics, Affidavit

of Kenneth L. Siegal (September 26, 1979), the use of the test would be "unfair" as that term is used by the Guidelines. 29 C.F.R. § 1607.14(B)(8)(a)(1979). Accordingly, under the Guidelines, the use of Examination No. 36-435 may be "revis[ed] . . . to assure compatibility between the probability of successful job performance and the probability of being selected." *Id.* § 1607.14(B)(8)(d). Thus, the addition of 250 points, as a revision of the use of the examination is authorized by the Guidelines.[2/] Affidavit of Richard S. Barrett, p. 4; Letter from Leroy D. Clark, General Counsel of the Equal Employment Opportunity Commission (January 11, 1980).

Intervenors have submitted no affidavits of experts and have offered no

expert testimony that would controvert the facts established by plaintiffs' and defendants' experts. Instead, intervenors rely exclusively on argumentation of their counsel.

Finally, the intervenors object to the job performance rating component of the examination itself on the grounds that the criteria used by the raters are so subjective as to allow the introduction of the personal bias and favoritism of the raters. New York caselaw requires that examinations governed by the Civil Service Law use standards that are sufficiently objective and specific so that the ratings that result from an application of those standards be reviewable by other examiners. *E.g., Sloat v. Board of Examiners*, 274 N. Y. 367, 371 (1937);

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Fink v. Finegan, 270 N. Y. 356, 361, 1 N. E. 2d 462 (1936). Nevertheless, if an order remedying unconstitutional discrimination and violation of federal antidiscrimination laws were inconsistent with state law, such an order would be valid under the Supremacy Clause of the Constitution. U. S. Const. Art. VI, cl. 2. However, here, there is no need for the order to be inconsistent with state law, since the examination may be both non-discriminatory and use objective standards. We have, therefore, reviewed the proposed examination, as it is to be administered, both to determine whether it is sufficiently objective to meet the requirements of state law, as well as being non-discriminatory within the Fourteenth Amendment and other controlling

Federal law. We find that it meets both standards. There is no merit to intervenors' argument that Examination No. 36-435 uses insufficiently objective standards to satisfy state law. The standards are set forth in paragraph-long descriptions that relate specifically to the duties of correction officers. Furthermore, the intervenors' contention of non-objectivity, is belied by the result of statistical testing of the standards that produced an inter-rater reliability coefficient of .80 out of 1.00, indicating that the raters understood the standards in nearly the same way as each other -- a fundamental demonstration of "objectivity". Affidavit of Kenneth L. Siegal, ¶ 3 (October 16, 1979).

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Accordingly, the motion for summary judgment and the application to have the submitted order signed are granted.

It is so ordered.

DATED: New York, New York
January 21, 1980

MORRIS E. LASKER
U.S.D.J.

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FOOTNOTES

1/ 29 C.F.R. §§ 1607.1 *et seq.* (1979). These Guidelines were affirmed as controlling here by the Second Circuit. 520 F. 2d 420, 426 (2d Cir. 1975).

2/ In a letter to the court, the intervenors argue that the decision in *Fullilove v. Beame*, 48 N. Y. 2d 376 (1979), mandates that the 250 points addition to the scores of Blacks and Hispanics cannot be approved. In *Fullilove*, the court voided executive orders of Governor Carey and former Mayor Beame directing the construction industry to implement affirmative action hiring programs to increase the number of minority and women workers because the executive branch of New York government had no authority "to initiate affirmative action without legislative authorization." That case is distinguishable for two reasons: first, turning on the authority vested in the executive branch of the state government, *Fullilove* bears no relevance to the authority of a district court implementing the mandate of the Second Circuit to order a remedy to the violation of the federal constitution and anti-discrimination laws. Second, even if *Fullilove* were relevant here, as noted earlier,

the addition of 250 points is not equivalent to the setting of a quota, as intervenors claim. Rather, the adjustment of the scores of minority applicants is more aptly characterized as the type of action approved by the court "which 'only would enlarge the pool of persons eligible for employment based on discrimination-free merit selection'" (quoting *Broidrick v. Lindsay*, 39 N. Y. 2d 641, 649 [1976]).

APPENDIX C--ORDER AND JUDGMENT,
JANUARY 21, 1980.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants,

-and-

ALBERT RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

DENNIS FITZPATRICK, *et al.*,

Intervenors-Defendants.

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Defendants having filed their report entitled "Correction Sergeant Selection System: Validity and Ethnic Effect" with Appendices "1" through "3" in support of the criterion validity of Examination No. 36-435 and in compliance with paragraphs "3" and "6" of the Order and Decree dated July 31, 1974, affirmed in relevant part by the United States Court of Appeals for the Second Circuit on August 6, 1975, and the affidavits of Kenneth L. Siegal sworn to September 26, 1979, and October 16, 1979, the supplemental affidavit of Kenneth L. Siegal sworn to December 3, 1979, the affidavit of Richard S. Barrett sworn to December 7, 1979, and the letter dated January 11, 1980 from Leroy D. Clark; and plaintiffs having no opposition thereto; and proposed

intervenors-defendants having filed a complaint on or about October 3, 1979 with Exhibits "A" and "B" and the supporting affidavits of Dennis Fitzpatrick, sworn to October 2, 1979, Vincent DiGiorgio, sworn to October 2, 1979, Robert Vercile Rose, sworn to October 2, 1979, Raymond E. Friss, sworn to October 2, 1979, Ronald Van Deusen, sworn to November 28, 1978, Paul Murphy, sworn to December 6, 1978, John Casey, sworn to November 25, 1978 and Raymond Cornelison, November 28, 1978; and the court having afforded the parties an opportunity to be heard on September 26, 1979, and November 9, 1979, and the plaintiffs and defendants on December 12, 1979 having moved for summary judgment dismissing the Fitzpatrick intervenors' complaint, and

the court having granted that motion, and after due deliberation, it is

ORDERED AND ADJUDGED:

1. Proposed intervenors Dennis Fitzpatrick, Frank McDonnell, Bruce Farrell, Thomas Farron, Vincent DiGiorgio, Robert Vercile Rose, Raymond E. Friss and Bruce Meservey are permitted to intervene.

2. Examination No. 36-435 is approved as criterion valid under the Uniform Guidelines on Employee Selection Procedures as promulgated in 43(166) Fed. Reg. 38290 *et seq.* (August 25, 1978).

3. Examination No. 36-435 is a competitive examination under the New York Constitution Article V, §6, and Civil Service Law §§50(1), (2), 52.

4. The scoring of candidate performance on Examination No. 36-435 shall

incorporate the concept of fairness, or differential validity, set forth in the Uniform Guidelines §14(B), (8)(a), (d), 433(166) Fed. Reg. 38301 (August 25, 1978) and in the Regulations of the Department of Civil Service §67.1(g), and defendants shall add 250 points to the composite scores (weighted raw score as set forth in Table 5 of the report) for Black and Hispanic candidates on Examination No. 36-435 to implement this concept.

5. The eligible list resulting from Examination No. 36-435 shall supersede all outstanding eligible lists for Correction Sergeant, including the eligible list for Correction Sergeant (Male) that resulted from the interim selection procedure authorized by the Orders dated

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July 31, 1974, April 19, 1976, June 2, 1977 and July 21, 1977.

6. The eligible list resulting from Examination No. 36-435 shall be established no later than October 22, 1979 and shall remain in full force and effect for four (4) years from its establishment as authorized by Civil Service Law §56.

7. This Order and Judgment shall not be used by defendants as evidence of the validity of any selection procedure other than Examination No. 36-435.

8. The court retains jurisdiction over this cause for the purpose of hearing all matters pending.

DATED: New York, New York
January 21, 1980

/s/MORRIS E. LASKER
U.S.D.J.

APPENDIX D--ORDER, AUGUST 22, 1979.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, *et al.*,

Plaintiffs,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

73 Civ. 1548 M.E.L.

- X

A conference having been held July 23, 1979, in the chambers of Honorable Morris E. Lasker, attended by Judith Reed and Deborah Greenberg, attorneys for plaintiffs, Patricia Armstrong, for Attorney General Robert Abrams, attorney

for defendants, Patrick Fish, attorney for defendant Department of Correctional Services, Jeffrey G. Plant, attorney for Intervenors, and Messrs. John Van de Car, Peter Brown and Arthur Rabideau, all of the New York State Department of Correctional Services; in accordance with my oral direction at pages 30-31 of the transcript of said hearing, it is hereby

ORDERED that by not later than September 7, 1979, defendant Civil Service Commission submit to attorneys for all parties the results of Examination 36-435, together with such analyses of the results of the examination as are completed by that date.

DATED: New York, New York
August 22, 1979

s/MORRIS E. LASKER
United States District Judge
Southern District of New York

APPENDIX E--OPINION OF DISTRICT COURT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
73 Civ. 1548

EDWARD L. KIRKLAND, et al., *Plaintiffs*,

- v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al., *Defendants*.

Filed: April 2, 1974

LASKER, District Judge:—This suit is another in an ever-extending series of challenges to civil service examinations. Plaintiffs, who are Correction Officers,[1] provisionally appointed to the rank of Correction Sergeant (Male), contend that the test for promotion and permanent appointment to that position discriminated against them on the basis of race. They seek to represent all Black and Hispanic Correction Officers and provisional Correcton Sergeants who failed the examination, who passed it but ranked too low to be appointed or who were deterred by the appointment system from seeking promotion. Defendants are the New York State Department of Correcitonal Services, its Commissioner, and the New York State Civil Service Commission and its Commissioners.

The action is brought under the Fifth and Fourteenth Amendments to

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1 Originally, there was a third named plaintiff, the Brotherhood of New York State Correction Officers, Inc. However, this plaintiff withdrew at the commencement of the trial.

the Constitution and under the Civil Rights Act (42 U.S.C. § § 1981 and 1983) and its jurisdictional counterpart (28 U.S.C. § § 1343(3) and (4)). Plaintiffs make no claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § § 2000e-2000e-17), despite the availability, by recent amendment, of remedies under it against states and municipalities (id. at § 2000e(a)).[2]

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2 Defendants urge us to apply the doctrine of primary jurisdiction and defer the case to the Equal Employment Opportunity Commission on the theory that by extending Title VII to cover states and municipalities Congress intended to oblige persons seeking redress against governmental discrimination in employment to resort in the first instance to the EEOC. This contention has been resoundingly rejected in cases involving suits against private employers under 42 U.S.C. § 1981. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 996-97, 5 FEP Cases 994 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623-24, 4 FEP Cases 749 (8th Cir. 1972); Caldwell v. National Brewing Co., 443 F.2d 1044, 3 FEP Cases 600 (5th Cir.), cert. denied, 405 U.S. 916, 4 FEP Cases 324 (1971); Young v. International Telephone & Telegraph Co., 438 F.2d 757, 763, 3 FEP Cases 146 (3rd Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100-1101, 2 FEP Cases 942 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971). Furthermore, cases in this Circuit involving suits which, like the instant case, were brought under § 1938 hold that the amendment to Title VII was not intended to foreclose recourse to the earlier Civil Rights Act. Vulcan Society v. Civil Service Commission, 6 FEP Cases 1045, No. 73-2287 (2d Cir., Nov. 21, 1973), slip op. at 449, n.1; Bridgeport Guardians, Inc., v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1334, n. 1, 5 FEP Cases 1344 (2d Cir. 1973).

In spring, 1972, the 1970, eligible list for Sergeant appointments was exhausted. To fill needed positions pending establishments of a new list, the Department of Corrections appointed provisional Correction Sergeants, in August, 1972, to hold their posts until permanent appointments could be made. Both named plaintiffs were appointed at that time.

Upon request of the Department of Corrections, the Civil Service Commission prepared a promotional examination which was administered on October 14, 1972. That examination, 34-944, was taken and failed by plaintiffs and is the subject of this action.

34-944 was taken by 1,383 persons,[3] including 1,264 whites, 103 Blacks and 16 Hispanics. The candidates examinations were graded and the passing grade was established at 70%. After adjustment for veteran's preference and seniority, those who passed were ranked by grade and an eligible list was promulgated on March 15, 1973. On April 10, 1973, this suit was filed and a temporary restraining order entered preventing defendants from making appointments from the list and from terminating the provision-

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[3] The total candidate pool was approximately 1,441. However, for reasons not apparent from the record, the computer display provided by defendants to describe candidate performance (PX-12) indicates the performance of only 1,383 candidates. Since both parties have based their calculations on that figure, we will do likewise.

al appointments of plaintiffs or members of the class. By modification and stipulation, the restraining order was extended to maintain the status quo until a decision on the merits.

The ground rules for cases such as this have been thoroughly elucidated by recent decisions of the Court of Appeals for this Circuit. We note in particular Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission ("Vulcan"), 6 FEP Cases 1045, Civ. Nos. 73-2287 and 2317 (Nov. 21, 1973), aff'g 360 F.Supp. 1265, 5 FEP Cases 1229 (S.D. N.Y. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission ("Guardians"), 482 F.2d 1333, 5 FEP Cases 1344 (2d Cir.), aff'g in part and rev'g in part 354 F.Supp. 778, 5 FEP Cases 570 (D. Conn. 1973); and Chance v. Board of Examiners ("Chance"), 458 F.2d 1167, 4 FEP Cases 596 (2d Cir. 1972), aff'g 330 F.Supp. 203, 3 FEP Cases 672 (S.D.N.Y. 1971). To summarize the approach adopted by the cases, plaintiffs must first establish a prima facie case showing that the examination has had "a racially disproportionate impact." Vulcan, slip op. at 453; Castro v. Beecher ("Castro"), 459 F.2d 725, 732, 4 FEP Cases 1223 (1st Cir. 1972). If they succeed, it then becomes defendants' burden to justify the examination's use despite its differential impact by proving that it is job-related (Vulcan, slip op. at 453) and that any disparity of performance results solely from variance in qualification

and not from race (Griggs v. Duke Power Co., 401 U.S. 424, 430-31, 3 FEP Cases 175 (1971); Chance, 330 F.Supp. at 214). Discharging this burden would entitle defendants to judgment; failure would, of course, require the court to take the third step of determining what remedy would be appropriate.

As is typical cases of this type, plaintiffs do not allege that defendants have intentionally discriminated against their class. Such an allegation is not a necessary part of their case. Chance, 458 F.2d at 1175-76. As the Supreme Court stated in Griggs:[4]

"[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432, 3 FEP Cases at 178.

However, the fact that the alleged discrimination is not claimed to be deliberate modifies the burden placed on the state to justify its actions. Intentional racial discrimination would require the state to demonstrate a compelling necessity for its selection methods. Cf. Loving v. Virginia, 388 U.S. 1 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, "the Supreme Court has yet to

[4] Griggs arose under Title VII of the Civil Rights Act of 1964; however, the same approach to employment discrimination cases has generally been followed in § 1983 cases as in Title VII cases. Vulcan, slip op. at 459, n. 9; Castro, 459 F.2d at 733.

apply that stringent test to a case such as this, in which the allegedly unconstitutional action unintentionally resulted in discriminatory effects." Chance, 458 F.2d at 1177, 4 FEP Cases at 603. Agonizing over whether the state can discharge its constitutional obligations merely by suggesting a rational basis for the examination's use or whether it must satisfy a more demanding standard, short of the compelling interest test, is unnecessary. The guidelines have been so refined by the cases that no ambiguity obscures the road to determination regardless of difficulties of classification which may remain to plague the theorists. Guardians, 482 F.2d at 1337. The decisions impose on the state "a heavy burden of justifying its contested examinations by at least demonstrating that they were job-related." Chance, 458 F.2d at 1176, 4 FEP cases at 604; see also Guardians, 482 F.2d at 1337. This "heavy burden" is discharged if the state "come[s] forward with convincing facts establishing a fit between the qualification and the job." Vulcan, slip op. at 456, quoting Castro, 459 F.2d at 732. Once the state proves its case to that extent, it need not establish, as would be required under the compelling interest approach, that no alternate means of selection are open to it. Castro, 459 F.2d at 733; see also Vulcan, slip op. at 456.

However clearly the issues are delineated by well-established precedent, nothing can make easy the task

of deciding a case such as this. The competing interests are vital to the named parties, to other individuals who may be affected by the outcome and to the public at large. Plaintiffs strive to insure for themselves and the minorities they seek to represent the fair treatment in the public employment sphere which the Constitution guarantees. Their efforts bring them into conflict with those individuals who passed the challenged examination and have a vested interest in securing the promotions which are rightfully theirs if the examination is upheld. For both groups, the outcome is critical since it affects their ability to earn a living by advancing in the profession of their choice. Last and perhaps most important is the public's stake in establishing and maintaining a system of prison administration which is both competent and representative of the population. As members of the public, we include, of course, the inmates of the prison system who, more than anyone else in the community, are directly affected by the quality of correctional supervision. The delicacy of the decision is further compounded by the potential for heightened tension which attends any direct conflict along racial and cultural lines.

Bearing these factors in mind, we proceed, with caution but without more ado, to a consideration of plaintiffs' prima facie case.

I. Disproportionate Impact

Plaintiffs rest their case on the following uncontested statistics. The figures computed by defendants indicate that White candidates passed 34-944 at a rate of 30.9%, while only 7.7% of Black candidates and 12.5% of Hispanic candidates achieved a passing score. (Transcript at 500). That is, Whites passed at a rate approximately four times that of Blacks and 2.5 times that of Hispanics. Defendants concede the statistical significance of these differences. (Post-trial Memorandum at I-4.)

Plaintiffs' evidence reveals an even more startling disparity among those who ranked high enough to be appointed. The Department of Corrections intends to appoint a maximum of 147 persons from the present eligible list.[5] A computer display of the results of 34-944 (PX-12) reveals that, of 159 persons who scored 57 or above (a group large enough to satisfy the Department's projected needs), 157 were White, two were Black and none were Hispanic. Thus, 12.5% of the Whites who took 34-944 are likely

[5] The Department of Corrections appointed 87 persons from the eligible list based on 34-944 in April, 1973. (PX-2, answer to Interrogatory No. 39.) On May 29, 1973, the Department indicated that it intends to make another 40-60 appointments from the list within roughly two years from that date. (PX-2, answer to Interrogatory No. 40.) Thus, a maximum of 147 persons will be appointed through May of 1975. No appointments are likely after that date, since another promotional exam will be given in 1974 (PX-42, p.4., 7th par.) and the eligible list from 34-944 will therefore expire in 1974 or early 1975.

to be appointed, while only 1.9% of Black candidates and no Hispanics have a chance at appointment. These results would lead to the appointment of Whites at 6.5 times the rate of Blacks and would bar completely the appointment of Hispanics.

The statistical significance of these figures is established beyond dispute by the earlier cases. In Chance, Guardians and Vulcan, the impact was less drastically disproportionate among the races. In Chance, the passing rate for Whites was 1.5 times that of Blacks and Hispanics (330 F.Supp. at 210); in Guardians, Whites passed at 3.5 times the rate for Blacks and Hispanics (354 F.Supp. at 784); and in Vulcan, Whites scored high enough to have a chance at appointment at 2.8 times the rate for Blacks and Hispanics (360 F.Supp. at 1269).

Defendants do not challenge the accuracy of plaintiffs' figures (for which they are the source) nor do they deny the statistical significance of the differential impact indicated by them. They contend, however, that the approach taken by plaintiffs, that is, consideration of the statistics as to the statewide impact of the entire exam, does not accurately reflect the performance of the groups in relation to each other. They urge us, rather, to base our determination of racial impact on the candidates' performances facility by facility rather than throughout the state. They contend that otherwise it is impossible to

determine whether minority candidates are succeeding less well as a group because of their racial and cultural backgrounds or because they are located at facilities which, for reasons unspecified, prepare their officers less well for the promotional exam. In fact, the great majority of minority candidates are located at Ossining (82 Blacks out of a total of 104, 9 Hispanics out of a total of 16) with the second largest concentration of Blacks at Greenhaven (8). (PX-12, codes 1007 and 1008.) Defendants argue that if both Whites and minority candidates at Ossining perform less well than persons—White, Black or Hispanic—employed at other facilities, then 34-944 has not been shown to differentiate on the basis of race. Second, defendants content that, since 34-944 is composed of five subtests, comparative performance on each subtest should be determinative rather than performance on the test as a whole. If these approaches are adopted, they claim, the three groups of candidates will be shown not to have performed sufficiently differently to make out a prima facie case of disproportionate impact.

To support their argument that the results of 34-944 are relevant only if separated by facility, defendants rely on an analysis of the computer display of examination results (PX-12) drawn up by Kenneth Siegel, the Associate Personnel Examiner who was responsible for the preparation of 34-944. He analyzed the performances of

the groups in terms of mean scores on the total exam and on each of the five subtests at Ossining, Green Haven, all the other facilities and all the facilities taken together (DX-DD). The reason for selecting Ossining and Green Haven for special attention was the concentration of minority candidates at those facilities. Siegel's written analysis (DX-DD) does not indicate passing rates, but only mean scores. However, Siegel testified that the difference in passing rates between Whites and Blacks at Green Haven (Transcript at 511) and all other facilities except Ossining is not statistically significant (Transcript at 509, 515). Based on Siegel's testimony, defendants argue that as a result plaintiffs' prima facie case fails with respect to all facilities except Ossining.

The principal obstacle to accepting defendants' analysis is that it is premised on assumptions which are factually erroneous. Their own statistics bely their theory. Siegel's analysis (DX-DD) of the computer display (PX-12) reveals not only that the mean score for Whites state-wide (48.9) is superior to that of Blacks (43.2) and Hispanics (44.2), but also that the mean scores at Ossining, Green Haven and other facilities considered separately reflect the same pattern. Whites at Ossining achieved a mean score of 47.32, compared with

42.96 for Blacks and 41.56 for Hispanics. The disparity at Ossining is virtually identical to that derived from a comparison of state-wide figures for Whites and Blacks (48.9 to 43.2) and is greater than the state-wide difference between Whites and Hispanics (48.9 to 44.2). This effectively refutes defendants' theory that minority candidates generally performed less well than Whites solely because they were concentrated at Ossining where candidates as a whole did less well. The range at Green Haven is almost as striking and indicates again a greater variance than is found state-wide between Whites and Blacks and an almost identical disparity as that found state-wide between Whites and Hispanics: Whites, 48.68; Blacks 42.00; Hispanics, 44.00. A comparison of results at facilities other than Ossining and Green Haven bears out the trend: Whites, 49.00; Blacks, 45.21; Hispanics, 48.17. It is true that Hispanics at these facilities fared better than at Ossining and Green Haven and their scores more closely approximate the performance of Whites. However, the importance of this discovery is somewhat discounted by the small size of the sample (6 Hispanic candidates) which decreases the possibility of statistical accuracy (Transcript at 936-37). Furthermore, Siegel's analysis indicates that the standard deviation in mean scores between Whites and Blacks was statistically significant at Ossining, Green Haven and all other fa-

cilities as well as state-wide, and the same is true of Whites and Hispanics at Ossining where the largest concentration of Hispanics is found. (DX-DD.)

An analysis of passing rates, which is more appropriate since it is the passing score which determines a candidate's eligibility for appointment, is even more illuminating. Siegel testified that there was a significant difference between the passing rates of Whites and Blacks at Ossining (Transcript at 509), but that no such difference existed between Whites and Blacks at Green Haven and facilities other than Ossining and Green Haven and none between Whites and Hispanics at Ossining, or other facilities. (Transcript at 509-515.) He did not compare the passing rates of Whites and Hispanics at Green Haven because there was only one Hispanic candidate at that facility. (Transcript at 511.) Nor did he testify as to the difference between the passing rates of Whites and Hispanics at facilities other than Ossining and Green Haven. Siegel is correct that the disparity in passing rates between Whites and Blacks at Ossining is significant: Whites passed at a rate of 23.5% and Blacks at a rate of 4.9%. (PX-33.) However, his testimony as to Blacks at Green Haven and at other facilities and as to Hispanics at Ossining flies in the face of the figures in evidence. To the contrary, comparison of

the groupings mentioned above indicates in each instance a significant disparity between the passing rate of White and minority candiates. Whites at Green Haven passed at a rate of 31.6%, while Blacks and Hispanics achieved rates of only 12.3% and 0% [6] respectively. 30.7% of Whites at facilities other than Ossining and Green Haven [7] passed 34-944, while only 14.3% of Blacks passed. Although Hispanics at facilities other than Ossining and Green Haven passed at a higher rate than Whites (33.3% compared to 30.7%), the reliability of this computation is put in doubt by the smallness of the sample. Hispanics at Ossining, on the other hand, passed at a rate of 0% compared to a White passing rate of 23.5%. Accordingly, contrary to Siegel's conclusion, the

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6 Inasmuch as there was only one Hispanic candidate from Green Haven, the importance of this comparison should not be exaggerated.

7 The figures for White, Black and Hispanic passing rates at facilities other than Ossining and Green Haven are not in the record, but can be readily computed from those which are in evidence (see PX-33). The number of Whites at "other facilities" is 1069 (1264, the total of White candidates, minus 195, which is the sum of White candidates at Ossining, 81, and Green Haven, 114). The number of Whites at "other facilities" who passed is 328 (383 minus 55, the sum of 19 at Ossining and 36 at Green Haven). Accordingly, the passing rate is 30.7%. Blacks at "other facilities" number 14 (103 minus 89, which is 81 at Ossining and 8 at Green Haven). Two Blacks at "other facilities" passed (7 minus 5). As a result, the passing rate is 14.3%. There were six Hispanics at "other facilities" (16 minus 10, nine at Ossining, one at Green Haven). Two passed and the rate is 33.3%.

disparity between White and minority candidates was significant with regard to Blacks at Ossining, Green Haven and all other facilities, as well as state-wide, and was significant with regard to Hispanics at Ossining, where the largest number of Hispanics are located.

These computations destroy the factual premise of defendants' argument that minority performance reflects the facilities in which they concentrated rather than their minority characteristics. We would in any event be forced to reject defendants' theory as a matter of law, even if it could be factually substantiated. Attempts to correlate racial performance to such non-racial characteristics as quality of schooling or educational and cultural deprivation have been rejected as irrlevant to rebut a statistical prima facie case. As the district court opinion in Guardians stated:

"More fundamentally, this data [as to quality of schooling] fails to remove the *prima facie* showing of discrimination because it does not alter but only tries to explain the difference in passing rates." 354 F.Supp. at 785, 5 FEP Cases at 575; see also Vulcan, 360 F.Supp. at 1272. Cf. Castro supra.

The controlling decisions clearly posit that, in order to shift to defendants the burden of showing that performance on the examination correlates to performance on the job, plaintiffs are required to do no more than demonstrate that minority candidates as a

whole fared significantly less well than White candidates, regardless of possible explanations for their poorer performance. To quote Guardians once more:

"The point is that a discriminatory test result cannot be rebutted by showing that other factors led to the racial or ethnic classification. The classification itself is sufficient to require some adequate justification for the test." Id at 786, 5 FEP Cases at 575.

Finally, we fail to understand the relevance of defendants' attack on plaintiffs' prima facie case. Defendants appear to concede that, at the very least, Blacks at Ossining who failed 34-944 have established their right to challenge its job relatedness. (Post-trial Memorandum at I-11). This group constitutes two-thirds of the proposed plaintiff class (77 out of 117 Blacks and Hispanics combined), but if even a far smaller number had succeeded in proving disproportionate impact detrimental to themselves, defendants would be obliged, as they themselves concede, to prove job relatedness.

We turn to defendants' second challenge to plaintiffs' case. Siegel's analysis of the computer display indicates that although there is a statistically significant difference in the total mean scores of Whites and Blacks and Whites and Hispanics

state-wide and at Ossining, and, as to Blacks, at Green Haven and facilities other than Ossining and Green Haven, not every subtest indicates such a disparity. (DX-DD.) It is unnecessary to detail the permutations sub-test by sub-test and facility by facility, since the suggested approach itself is invalid as a matter of law. The cases indicate that a showing that the overall examination procedure produced disparate results cannot be rebutted by fragmenting the process and demonstrating that separately the parts did not differentiate along racial or cultural lines. In Chance, for example, the fact that minority candidates had a higher passing rate than White candidates on seven out of fifty examinations did not vitiate plaintiffs' proof that the series of examinations as a whole discriminated against them and their class. 330 F.Supp. at 211; see also Guardians, 354 F.Supp. at 786. In Vulcan, the very question whether a single examination procedure can properly be subdivided and the parts considered separately, was raised and Judge Weinfield rejected the proposition:

"Moreover, the examination may not be truncated; whether or not it has an adverse discriminatory impact on minority groups should be considered in terms of the total examination procedure. Here there can be no doubt, whatever the relative impact of component parts, that in end result there was a significant and substantial discriminatory impact upon minorities. . . ." 360 F.Supp. at 1272, 5 FEP Cases at 1234.

Any other approach conflicts with the dictates of common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual subtests. Accordingly, plaintiffs' case stands or falls on comparative passing rates alone. Thus, in law and in logic, we find defendants' approach unwarranted.

Rejection of defendants' dual attack on plaintiffs' showing of differential impact leaves no doubt that plaintiffs' prima facie case has been amply estabished. Accordingly, the burden of proof swings to defendants to demonstrate that 34-944 is job-related. We turn to a consideration of that question.

II. Job-Relatedness

"Validation" is the term of art for designating the process of determining the job-relatedness of a selection procedure. Cases and official guidelines recognize three validation methods: criterion-related validation, construct validation and content validation. See, e.g., Vulcan, slip op. at 458-61; Guardians, 482 F.2d at 1337-38 and 354 F.Supp. at 788-89; Equal Employment Opportunity Commission Testing and Selecting Employees Guidelines ("EEOC Guidelines"), 29 C.F.R. § 1607, at § 1607.5(a); American Psychological Association Standards for Educational & Psychological Tests and Manuals ("APA Standards") (PX-26) at 12-13.

A. Criterion—Related Validation.

Decisions in this Circuit and the EEOC Guidelines agree that criterion-related or empirical validation is preferable to other validation methods. Guardians, 482 F.2d at 1337 and 354 F.Supp. at 788; Vulcan, 360 F.Supp. at 1273; EEOC Guidelines at § 1607.5 (a). In Vulcan, Judge Weinfeld defined the two methods which are subsumed under the criterion-related rubric:

"Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job-related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job." 360 F.Supp. at 1273, 5 FEP Cases at 1235.

The methodology which unites the two types of criterion-related validity requires two fundamental steps:

"Criteria must be identified which indicate successful job performance. Test scores are then matched with job performance ratings for the selected criteria." Guardians, 482 F.2d at 1337, 5 FEP Cases at 1347.

The EEOC's minimum standards for validation (EEOC Guidelines at § 1607.5) require an employer to undertake criterion validation if it is

feasible. They demand "empirical evidence in support of a test's validity . . . based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in [APA Standards]". Id. at subdiv. (a). They state further that "[e]vidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible." Id.

Because this case was not brought under Title VII and no resort has been made to the EEOC as would be required under the 1964 Act, the Commission Guidelines are not binding and cannot finally resolve the issue whether criterion-related validation is required. However, the Guidelines are recognized as relevant and useful as a "helpful summary of professional testing standards" (Vulcan, slip op. at 457-58, n. 8, 6 FEP Cases at 1049) and as "persuasive standards for evaluating claims of job-relatedness" (Vulcan, 360 F.Supp. at 1273, n. 23, 5 FEP Cases at 1235).[8]

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[8] See also Carter v. Gallagher, 452 F.2d 315, 320, 326, 3 FEP Cases 900 (8th Cir. 1971), adopted in relevant part, 452 F.2d 327, 4 FEP Cases 121 (8th Cir.) (en banc), cert. denied, 406 U.S. 950, 4 FEP Cases 771 (1972); Fowler v. Schwarzwalder, 351 F.Supp. 721, 724, 5 FEP Cases 270 (D. Minn. 1972); Pennsylvania v. O'Neill, 348 F.Supp. 1084, 1103, 5 FEP Cases 277 (E.D. Pa. 1972), aff'd in relevant part by an equally divided court, 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973) (en banc); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 4 FEP Cases 792 (N.D. Cal. 1972).

Notwithstanding the Guidelines' mandate of criterion-related validation and despite suggestions in some cases that only that method suffices to carry the burden of proof as to job-relatedness (Vulcan, 360 F.Supp. at 1273; Guardians, 354 F.Supp. at 789), no case in this Circuit has gone so far as to hold that failure to test an exam by criterion validation or to demonstrate the nonfeasibility of that approach justifies setting the exam aside even if it has been content validated. Those cases which have indicated a preference for criterion-related validation have also found a lack of content and construct validation before striking down an examination. Furthermore, the Court of Appeals for this Circuit has recently abjured an absolutist approach, stating that "failure to use [criterion-related validation] is not fatal." Vulcan, slip op. at 459, 5 FEP Cases at 1235.

Defendants specifically admit that 34-944 has not been validated by the criterion-related approach. (Transcript at 389; PX-2, answer to interrogatory 26.) However, in view of Judge Friendly's unambiguous statement in Vulcan that criterion-related validation is not required if the examination can be validated by other means, we turn our attention to the other validation methods.

B. Construct Validation.

The second recognized method of validation is "construct validation."

As defined by Judge Friendly in Vulcan, this method "requires identification of general mental and psychological traits believed necessary to successful performance of the job in question. The qualifying examination must then be fashioned to test for the presence of these general traits."[9] Slip op. at 460-61. We mention this method only for the sake of completeness; none of the parties has introduced evidence that its use would be appropriate here or that its requirements have been fulfilled.

C. Content Validation.

We reach finally the dispositive issue in the case: Have defendants demonstrated that 34-944 is a content valid examination?

Initially, it is essential to determine precisely what proof is necessary to satisfy the requirements of content validity. Judge Weinfeld's definition in Vulcan reflects the principles established by case law and professional publications:

"An examination has content validity if the content of the examination matches the content of the job. For a test to be

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9 The common example which is given to highlight the different characteristics of the content and construct validation methods involves an examination for the position of typist. A content valid test would require the applicant to type. In such an instance the content of the job and of the exam is identical. A construct valid approach would identify certain traits essential to success as a typist, such as ability to concentrate, perserverance and attention to detail, and would examine the applicant for those traits. Vulcan, slip op. at 460-61.

content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination tests these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F.Supp. at 1274, 5 FEP Cases at 1236 (footnotes omitted). See also Vulcan, slip op. at 460; Guardians, 482 F.2d at 1338.

Accordingly, defendants must demonstrate not only that the knowledge, skills and abilities tested for by 34-944 coincide with some of the knowledge, skills and abilities required successfully to perform on the job, but also that 1) attributes selected for examination are critical and not merely peripherally related to successful job performance; 2) the various portions of the examination are accurately weighed to reflect the relative importance to the job of the attributes for which they test; and 3) the level of difficulty of the exam matches the level of difficulty for the job. In sum, to survive plaintiffs' challenge, 34-944 must be shown to examine all or substantially all the critical attributes of the sergeant position in proportion to their relative importance to the job and at the level of difficulty which the job demands.

The problem which confronts the trier of fact when charged with applying these principles to a given situation is that normally, and it is the

case here, he is expert neither in psychometrics nor in the field in which the examination is given. Nevertheless, he is required to make factual determinations 1) whether the examination meets professionally acceptable standards of technical adequacy and 2) whether it has content validity for the job examined. (See EEOC Guidelines, 29 C.F.R. at § 1607.5 (a).) [10] To overcome the obstacle presented by lack of expertise, the cases have developed an approach which minimizes the obvious dangers inherent in judicial determination of content validity for a job about which the judge has, at best, only superficial knowledge. Judge Friendly described with approval the approach taken by Judge Weinfeld in Vulcan as follows:

"Instead of burying himself in a question-by-question analysis of Exam 0159 to determine if the test had construct or content validity, the judge noted that it was critical to each of the validation schemes that the examination be carefully prepared with a keen awareness of the need to design questions to test for particular traits or abilities that had been determined to be relevant to the job. As we read his opinion, the judge developed a sort of sliding scale for evaluating the examination, wherein the poorer the quality of the test preparation, the greater must be the showing that the examination was properly job-related, and *vice*

[10] The EEOC Guidelines state: "Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question." 29 C.F.R. at § 1607.5(a).

versa. This was the point he made in saying that a showing of poor preparation of an examination entails the need of 'the most convincing testimony as to job-relatedness.' The judge's approach makes excellent sense to us. If an examination has been badly prepared, the chance that it will turn out to be job-related is small. *Per contra,* careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand. See Chance, supra. 458 F.2d at 1173." Slip op. at 461, 6 FEP Cases at 1051.

The primary emphasis, therefore, is on the validity of the methods used in creating the examination not on the independent validity of the end product.

Preparation of a content valid examination requires cooperation between subject matter experts who provide content input and psychometric experts who construct an examination using that input. It goes without saying that the competence of the people involved in the process determines the qualify of the product. The cooperative effort of these two groups includes several stages: 1) Analysis of the job to isolate the essential knowledge, skills and abilities required by it; 2) determination of the scope of the examination, the method or methods of testing to be

employed and the weight to be given different portions of the examination process; 3) formulation of individual items; and 4) establishment of the passing point.

The cornerstone in the construction of a content valid examination is the job analysis. Without such an analysis to single out the critical knowledge, skills and abilities required by the job, their importance relative to each other, and the level of proficiency demanded as to each attribute, a test constructor is aiming in the dark and can only hope to achieve job relatedness by blind luck. As Judge Weinfeld stated in Vulcan:

"There is no dispute between the parties that a thorough knowledge of the job to be tested is necessary in order to construct a content valid examination. Without this knowledge it is impossible to determine whether the content of the examination is sufficiently related to the content of the job to justify its use. The means used to acquire this information is known professionally as a job analysis—really the beginning point. A job analysis is a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill." 360 F.Supp. at 1274, 5 FEP Cases at 1236.

The persons charged with the responsibility for 34-944, Siegel and Samuel Taylor, testified that, although an adequate job analysis was performed, it does not exist in documentary form. (Transcript at 362-63,

682-83.) Defendants contend, however, that the existence of such an analysis is demonstrated by various documents which are in evidence, namely, a job audit (DX-E), KS & A [11] statements (PX-8), class specifications (PX-4) and the rule book (DX-O). (Transcript at 362.) They argue further that the term "job analysis" means "a series of operations or understandings, discussions by which you identify what people do and why and what can be tested and what should be tested" (Transcript at 362-63) and as such is a "process [that] cannot really be reduced to something called a job description" (Transcript at 363; see also Transcript at 683). Accordingly, defendants rely on the knowledge of the job, either pre-existing or obtained during the course of the preparation of 34-944, possessed by those who participated in the examination's construction.

The difficulties presented by defendants' approach are manifold. Accepting their argument that a job analysis need not be reduced to writing, it is nonetheless not persuasive that an adequate job analysis existed at some point in the minds of defendants' experts, if, at the present time, they are unable to prove its existence. In fact, the existence of such an analysis has not been proven. The documents relating to the subject

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11 "KS&A" is the standard abbreviation for "knowledge, skills and abilities."

which are in evidence do not even approximate a professionally adequate job analysis; the test constructors' knowledge which was not committed to writing is in some instances unproven and in others unimpressive; and the reliance of the test constructors upon various aspects of the purported job analysis is largely unestablished. The logical, and indeed inevitable inference is that no adequate job analysis was performed.

Since the existence of a job analysis is of primary importance in reaching a decision as to job-relatedness, we will comment on defendants' proof on the subject at some length.

Although Samuel Taylor, Chief Personnel Examiner, testified that, in his opinion, the job audit, KS & A statements, class specifications and the employee rule book together constituted a satisfactory job description "that would be an adequate basis for developing the examination" (Transcript at 362), these documents do not satisfy the requirements of a thorough job analysis as they have been developed by the cases. The job audit (DX-E) has such major flaws that it is almost irrelevant to the case; it was prepared for a purpose other than exam preparation, it was outdated at the time the exam was prepared, and it was devoted almost entirely to describing the position of Correction Officer, not Correction Sergeant. The audit was conducted in order to determine whether various

jobs in the Correction Officer Series should be upgraded for the Civil Service classification purpose of determining whether compensation for the positions should be increased. (Transcript at 353; PX-7.) [12] While a document prepared independently of the examination process is not *per se* disqualified for consideration in preparing a job analysis, it cannot substitute for an analysis having the specific goal of examination preparation in mind. Furthermore, the job audit was conducted in Spring, 1970 (Transcript at 360), while 34-944 was administered in October, 1972. Siegel, who was responsible for 34-944, testified that the Sergeant job changed within the two years prior to the examination dated. (Transcript at 533, see also PX-42, p. 4.) The audit, almost in its entirety, describes the Correction Officer job. Such references as there are to the Sergeant position do not approach the type of depth of analysis which is essential to the preparation of a job-related test. The audit does not indicate the relative importance of the skills and tasks involved in the Sergeant job or of the competency required for the various aspects of

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[12] That the goal of the audit is not coextensive and may even be inconsistent with that of a proper job analysis is demonstrated by the fact that, although the audit concluded that the Sergeant position should be reclassified to grade 17 (Transcript at 564; PX-4), the supervision subtest called for questions appropriate to grades 10-14 and the report preparation sub-test questions were geared to an entry level investigative position (PX-8).

the position, both of which are essential functions of a job analysis. Finally, the persons who prepared the audit did not participate in the preparation of the exam, nor is their competence to conduct the audit in any way established by the record. It is perhaps not surprising, in view of the limited utility of the audit—and this is perhaps the most critical point to make on the subject—that it was not consulted by the test constructors in formulating specific exam items. (Transcript at 667-68.)

The other documents on which defendants rely fare no better as substitutes for a job analysis. The class specification (PX-4) is one paragraph description of the position which contains no more information than would be possessed by anyone with only a cursory knowledge of the job. It is a useless document for the intended purposes.

The same observation can be made about the KS & A statements (PX-8), which are descriptions of the five examination subtests rather than of the knowledge, skills and abilities demanded by the sergeant job. The "definition of KS & A" which appears for each subtest is a brief paragraph which states, as starkly as possible, the knowledge, skill or ability tested for, without any indication of gradations of complexity, context, methods or anything which would indicate how the knowledge, skill or ability operates in the actualities of the job. In

his deposition (a portion of which was read into the record), Siegel stated that "[t]he K, S and A statements are used as guidelines, in effect, in preparation of particular items or of items in general on—in that they represent the—the K, S and A statements represent those relevant portions of the position, let's say, which we wish to test and therefore act as a guide in telling us the types of items to write or select." (Transcript at 665.) This description of the use to which those documents were put is not credible, because the statements simply do not provide sufficient particularity to aid in the construction of specific items or even of clusters of items. They are only guidelines in the most general sense of blocking out the scope of the exam. Accordingly, it is not surprising that, as Siegel admitted, items on the exam were prepared before the KS & A statements. (Transcript at 666.) As a result, the statements are irrelevant to the job analysis, both because they are so lacking in detail as to serve no useful purpose and because they were not relied on. These phenomena are readily explainable by the fact that the KS & A statements were, in fact, the end product of the job analysis "process" rather than a component part of it, or a summary rather than a guideline. As Samuel Taylor stated, in terms which squarely contradict Siegel: "They [the test constructors] didn't rely on it [PX-8], be-

cause it didn't exist before they went through their process." (Transcript at 348.)

Finally, the rule book (DX-0) is obviously not a job analysis or a part of a job analysis. The rules themselves are, concededly, important to the job, but what is important to the analysis is how the rules are applied and what depth of knowledge is required, neither of which is indicated by the rule book.

Defendants' reliance on the knowledge of the sergeant job either possessed by the test constructors prior to commencing work on 34-944 or acquired by them during the course of their work on it is also inappropriate. The record does not establish that the persons who worked on the exam, three of whom came from the Department of Corrections and three from Civil Service, possessed the kind of intimate knowledge of the job that would enable them to do without a job analysis, or would make them, as Samuel Taylor claimed, "living job descriptions" (Transcript at 362).

Of the three persons from the Department of Corrections, only one, Hylan Sperbeck, testified. His qualification as a subject matter expert consists of long service in the Department. The respect to which years of experience might normally be entitled is greatly undercut in his case by the fact that the type of assignments which Sperbeck has held are not necessarily conducive to enhancement of his understanding of the

sergeant position. Sperbeck became a Correction Officer in 1957, a Sergeant in 1968, a Lieutenant in 1972 and a Captain in 1973. (Transcript at 738.) Since March, 1970, he has been assigned to the Training Academy and, since that time, he has spent only five or six weekends and four consecutive days in active line duty at any of the facilities. (Transcript at 764-65.) The result is that Sperbeck has been engaged in a normal supervisory capacity at a facility only for the two year period from 1968 to 1970, during which he was a Sergeant. Given the changes which have occurred in the job since that time, his experience, although useful, cannot substitute for a professionally acceptable job analysis. The qualifications as subject matter experts of the two other persons from Corrections (other than years of service) are not established by the record.

Siegel and the two other persons from Civil Service had no first-hand knowledge of the Sergeant position, although Siegel claims some familiarity with the job from past experience in preparing exams in the Correction Officer Series. He also testified to visits to Coxsackie and Matteawan, but the importance of these visits may not be overemphasized since the visit to the latter was for a purpose unrelated to 34-944 (in fact, there are no sergeants at Matteawan (Transcript at 541)), while the visit to the former entailed only an hour or two

of discussion with Sergeants (Transcript at 546-47), and, in any event, one day at a facility is hardly sufficient to make someone an expert as to the job. It is worthy of note, moreover, that two of the five subtests (40% of the exam) were prepared solely by Civil Service personnel, other than Siegel, without any input from the subject matter "experts" from Corrections. (Transcript at 367.)

Accordingly, the record does not establish that the knowledge and qualifications possessed by the test constructors was such that they can simply be deemed to have had in their heads a job analysis sufficient to satisfy legal and professional requirements. Indeed, a contrary inference is warranted by the record.

We conclude, therefore, that defendants have failed to prove that they performed an adequate job analysis. The same lack of professionalism which characterized the process by which defendants conducted their job analysis also characterized the manner in which they determined the type of examination, its scope, the weight of the subtests and the passing point. All of these matters seem to have been decided almost as a matter of course by referring to and following the practices established by prior exams.

The record indicates that the promotional examination for the Sergeant position has been for many years a written, multiple choice examination. This was true at least as

to the examinations given in 1964, 1968, 1970 and 1972. (PX-43) [13] When asked how the decision was reached that the knowledge, skills and abilities needed for the position of Correction Sergeant could best be treated by a written examination, Siegel stated in his deposition:

> "[I]t's to a large extent, I suppose, a decision of history, let's say, where previously selections for this position have been made by written examination and I would assume that the request that we received from the Department of Correctional Services for this examination also indicated request for a written examination." (Transcript at 697.)

Somewhat more thought seems to have gone into the decision not to use performance ratings as any part of the promotional process although such use is permitted by state law (Civil Service Law § 52(2)). (Transcript at 671-72.) Siegel and Taylor stated that they considered using supervisory evaluations, but decided not to because of the inadequacy of the existing rating scale. (Transcript 381-82, 672.)

Like the decision to use a written examination and to exclude consideration of supervisory evaluations, determination of the scope and organi-

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[13] PX-43 describes the scope of prior examinations given in 1964, 1968 and 1972. However, since Siegel testified that an examination was given in 1970 (Transcript at 531-33) and since 34-944 was given in 1972, we assume that 34-007, the last examination to precede 34-944, was in fact given in 1970 and not in 1972.

zation of 34-944 seems to have followed the pattern of earlier examinations. Of course, if these set a model for good construction and job-relatedness, that would be a good argument not to depart from their mold. However, while there is evidence in the record of the discriminatory impact of the earlier tests, there is no evidence as to their job-relatedness. Furthermore, even an exam once job-related may become out-dated as jobs change. At the very least, it is fair to say that the slavish imitation of earlier examinations which we find in this case indicates an alarming lack of independent thought about how to assure that 34-944 was job-related.

The scope of 34-944 was identical to that of the 1964, 1968 and 1970 examinations, except that some of the earlier examinations included a section on interpretation of written materials instead of or as well as the section on preparation of written reports found in 34-944. (Transcript at 530-32; PX-43.) The similarity is not accidental; Siegel and Samuel Taylor both testified that they relied heavily on prior scope statements in defining the scope of 34-944. (Transcript at 530-32, 659.)

Furthermore, the organization of 34-944 is virtually identical to that of its predecessors. Both 34-944 and the 1964 exam contain five subtests of 15 items, while the 1968 and 1970 tests consist of 90 items, including

four subtests of 15 items and one of 30 items. (PX-43.) When asked why each subtest on 34-944 was weighted equally with 15 items of the same value, Siegel replied: "By using a set number of items in each sub test, we are able to more routinely do certain types of analyses on this material that gives us additional information of how the items are working, and things like that." (Transcript at 566.) That this was a routine decision based solely primarily on administrative convenience is further evidenced by his statement that "in our department we work on the basis of 15 questions per sub test and we work in constructing a test in sub test units." (Transcript at 700.) This practice, however, is not necessarily compatible with the notion that different parts of the examination must be weighted as nearly as possible to reflect the relative importance of the attributes tested for to the job as a whole. This lack of individualization in the framing of 34-944 is again demonstrated by the fact that 60% of the items on the Sergeant exam were also found on the Lieutenant exam given at the same time. (Transcript at 534-35.)

Finally, the decision to establish the passing score of 70% subordinates the goal of job-relatedness to that of administrative convenience. Samuel Taylor and Siegel stated that they set the passing score at the maximum permitted by law (Transcript at 524),

because that score would still permit a sufficiently large group of passing candidates to satisfy the employment needs of the Department. (Transcript at 380, 524-27.) As a result, Taylor admitted that "its function is really more for the purpose of regulating the number of people who will then be in line to take the job than it is to declare that a man is qualified or not." (Transcript at 341.) Although this approach is not without justifying logic, it departs from the requirement, imposed by law, that such decisions be made so as to further the paramount goal of job-relatedness. Properly employed, the passing score should serve to separate those who are qualified for the job from those who are not. (Transcript at 880-81.) Admittedly, it did not serve that purpose in this case.

The factors described above lead inescapably to the conclusion that the procedures employed in constructing 34-944 do not conform to professionally acceptable and legally required standards. This determination may be enough to justify a finding that the examination is not job-related, without regard to the quality of the examination. See Fowler v. Schwarzwalder, 351 F.Supp. 721, 725, 5 FEP Cases 270 (D. Minn. 1972); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1355, 4 FEP Cases 772 (N.D. Cal. 1972). As Judge Weinfeld stated in Vulcan: "It should be self-evident that content validity

greatly depends upon the adequacy of the manner in which the examination is prepared." 360 F.Supp. at 1275, 5 FEP Cases at 1237. At a minimum, "under these circumstances only the most convincing testimony as to job-relatedness could succeed in discharging [defendants'] burden." Id at 1276, 5 FEP Cases at 1237.

This burden has not been met. To the contrary, positive evidence of job-relatedness is conspicuous by its absence. Defendants' expert, Dr. Erwin Taylor, specifically refused to testify that 34-944 was job-related. (Transcript at 809-11.) He was not willing to go beyond his statement that "if these procedures were in effect followed, they would constitute the steps necessary but not necessarily sufficient to the development of a series of job related tests." (Transcript at 809.) Plaintiffs' expert, Dr. Richard Barrett, a leading industrial psychologist and expert in the field, while declining to state positively that 34-944 was not job-related, did testify that the exam had not been demonstrated to be job-related (Transcript at 893-94) and indicated that he had "substantial doubts as to whether the test is in fact valid" (Transcript at 894-95).

Taking to heart Judge Friendly's implied caveat against "burying [ourselves] in a question by question analysis" of the exam (Vulcan, slip op. at 461), we merely note in passing some of the imperfections indicated by the record. Witnesses for

both sides agreed that certain items in the laws, rules and regulations subtest involve guidelines that a Sergeant would have no need to apply. (Transcript at 128-30, 132-33, 553, 774.) As to all the subtests, Dr. Barrett testified as to item defects, inconsistencies, and irrelevancies with regard to numerous questions. (Transcript at 903-22.) It is unnecessary to agree with his comments as to each item to find that the record supports his conclusion that 34-944 is not a professionally adequate examination. (Transcript at 922-23.)

More serious perhaps than specific item flaws is the fact that, regardless whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witnesses for both sides singled out as important to the Sergeant job. Among these are leadership, understanding of inmate resocialization, ability to empathize with persons from different backgrounds, and ability to cope with crisis situations. (Transcript at 63-64, 117, 308, 702-703.) We conclude, as did Judge Newman in Guardians, that:

"Even if the exam need not be comprehensive as to content or constructs, the evidence does not indicate whether the few areas of knowledge and the few traits measured are the ones that will identify suitable candidates for the job. . . . An exam of this sort, which does not attempt to be comprehensive in testing for content or constructs, employs a sampling approach. Such an exam might,

in some circumstances, be shown to meet the standard of job relatedness. But the evidence does not establish the representativeness of the knowledge or traits sampled by the exam used here." 354 F. Supp. at 792, 5 FEP Cases at 580.

Given the unwillingness of both experts to state positively that 34-944 is or is not job-related, it would be foolhardy on our part to hazard such an opinion. It is, of course, barely possible that the exam is job-related; "[d]efendants' burden, however, is not to establish possibilities but to demonstrate strong probabilities" (Vulcan, 360 F.Supp. at 1276, 5 FEP Cases at 1237 (footnote omitted)). We can say with certainty, and we are required to do no more, that the probabilities in this case run heavily against defendants. Accordingly, they have failed to meet the burden which the law imposes on them.

III. Remedy

We turn, therefore, to the question of relief. Plaintiffs seek 1) a permanent injunction against basing permanent appointments to the position of Correction Sergeant on the results of 34-944; 2) a mandatory injunction obliging defendants to develop a valid selection process for that position; and 3) an injunction requiring defendants to make interim and regular appointments of class members. They also seek a class action determination and an award of costs, including attorneys' fees.

Taking the class action question first, we find that plaintiffs have demonstrated the existence of a class satisfying the requirements of Rule 23 composed of all Black and Hispanic Correction Officers or provisional Correction Sergeants who failed 34-944 or who passed but ranked too low to be appointed.[14] The class is clearly too numerous to permit joinder: a total of 119 minority candidates, 103 Blacks and 16 Hispanics, took 34-944 and of these only 9 passed and only 2 (both Black) received a score of 57 or above giving them a chance at appointment. Accordingly, the class numbers 117 persons which is more than sufficient to satisfy the demands of Rule 23(a)(1). Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972). Whether examination 34-944 discriminated against minority candidates is the question of law common to the class and plaintiffs' claims are perfectly typical of the claims of the class.[15] Rule 23(a)(2) and (3). The

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[14] Plaintiffs originally sought to represent as well persons who were deterred from taking the examination by defendants' discriminatory employment practices. Since they introduced no evidence as to persons who might have been deterred, plaintiffs "do not now insist upon their inclusion in the class" (Post Trial Memorandum at 64), and we decline to include them.

[15] Defendants claim that the named plaintiffs cannot represent persons who passed the examination but ranked too low to be appointed because both named plaintiffs failed 34-944. However, plaintiffs' interests and those of persons who passed but whose low rank prevents their appointment are identical, and we reject defendants' contention that the claims of the former are not representative of those of the latter.

representative parties have amply demonstrated their ability to protect fairly and adequately the interests of the class by conducting the litigation to its present successful conclusion. Rule 23(a)(4). Finally, the defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2). Accordingly, it is proper that the case be treated as a class action.

We turn to the substantive relief requested by plaintiffs. Plaintiffs seek and are entitled to declaratory and injunctive relief against the use of 34-944 and the eligible list which was promulgated pursuant to it as a basis for appointments to the position of Correction Sergeant. Accordingly, examination 34-944 is declared unconstitutional and defendants are enjoined from making appointments based on its results. Furthermore, defendants are enjoined from terminating the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants solely because of their inability to pass 34-944.

The invalidation of 34-944 clearly authorizes the court to grant appropriate affirmative relief, including mandating the creation of a new selection process to conform with the requirements of the Fourteenth

Amendment and ordering the promotion of members of the plaintiff class in a ratio designed to correct the effect of defendants' unconstitutional employment practices. As the Supreme Court stated in Louisiana v. United States, 380 U.S. 145, 154 (1965):

> "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." See also, Guardians, 482 F.2d at 1340, 5 FEP Cases at 1349.

However, we believe it is appropriate to defer decision on the extent of affirmative relief to enable defendants to respond to the specific requests made by plaintiffs. Since, pursuant to court order, the post-trial memoranda in this case were submitted simultaneously, defendants have not as yet had the opportunity to address themselves to the recommendations contained in plaintiffs' brief and proposed order. We refer, in particular, to plaintiffs' suggestions that 1) the new selection procedure be required to conform with the EEOC Guidelines; 2) class members who are presently provisional Correction Sergeants [16] be permanently appointed to that position; 3) an interim permanent appointment procedure be instituted which would provide for the

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16 Plaintiffs also request the permanent appointment of Henry Liburd, a member of the class who was not provisionally appointed to the Sergeant position, because they contend that the record establishes his qualifications for permanent appointment.

promotion of minority persons in a ratio of at least one to each three White promotions; and 4) this promotion ratio be continued even after a valid selection procedure has been devised. Accordingly, defendants are instructed to submit an answering memorandum on these issues within ten days of the filing of this Opinion, plaintiffs to have the opportunity to reply within one week thereafter.

Finally, plaintiffs request an award of reasonable attorneys' fees. Defendants oppose on two grounds: 1) As a general rule, successful litigants cannot recover attorneys' fees from the losing party and plaintiffs have not shown themselves to fall into any exception to this rule; and 2) an award of attorneys' fees is barred by the doctrine of sovereign immunity and the Eleventh Amendment.

Defendants' first argument, while correctly stating the general approach, overlooks a growing line of cases, discussed below, which establishes an exception in favor of plaintiffs who act as private attorneys general and who litigate not only for their own benefit but also to vindicate the rights of others similarly situated and the interest of the public generally:

"The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity

and financial burden of private enforcement are such as to make the award essential." La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972).

In such cases, the protection of rights conferred both by the Constitution and by Congressional enactment requires that the normal rule be superceded. This exception to the general rule of not allowing attorney's fees derives from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), a class action under Title II of the Civil Rights Act of 1964, in which the Supreme Court stated that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Id. at 402; see also Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-97 (1970).

The fact that this suit was not brought under the Civil Rights Act of 1964, which specifically provides for the award of attorneys' fees, but rather under 42 U.S.C. §§ 1981 and 1983 which do not so provide, does not mandate a different result. In Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), the Court of Appeals relying on Piggie Park held that "attorney's fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied in [42 U.S.C.] Section 1982" Id. at 144. Indeed, the fact that subsequent Congressional legislation in furtherance of the same objective provided for the award of attorneys'

fees was considered by the Lee court to be relevant to a determination of appropriate remedies under the earlier Civil Rights Acts, which do not enact a panoply of specific remedies:

"[I]n fashioning an effective remedy for the rights declared by Congress look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this." Id. at 146.

We note, in this context, that Title VII of the 1964 Act, which provides a parallel route to the one chosen by plaintiffs here, allows for the award of attorneys' fees. 42 U.S.C. § 2000e-5(k). Furthermore, the absence of specific remedies in the earlier Civil Rights Acts authorizes the court to exercise its broad equitable power to include in the relief any remedy which furthers the vindication of Constitutional and Congressional policy, whereas if the statutes detailed the types of relief which they authorized and omitted attorneys' fees they would bar by inference such an award. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Harper v. Mayor and City Council, 359 F.Supp. 1187, 1217-18, 6 FEP Cases 1050 (D. Md. 1973).

Because the issue is important and novel, at least in this Circuit, we list at greater length than might otherwise be required some of the recent decisions which have granted attorneys' fees in suits under §§ 1981-83 on the "private attorney general"

theory, despite the absence of statutory authorization and without relying on a showing of bad faith or unreasonable obduracy by defendants. See Cooper v. Allen, 467 F.2d 836, 4 FEP Cases 1219 (5th Cir. 1972); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Homes Sites Corp., 444 F.2d 143, 144-48 (5th Cir. 1971); Harper v. Mayor, 359 F.Supp. 1187, 1217-18, 5 FEP Cases 1050 (D.Md. 1973); Wyatt v. Stickney, 344 F.Supp. 387, 408-409 (M.D. Ala. 1972); Sims v. Amos, 340 F.Supp. 691, 694-95 (M.D. Ala.) (three judge court), aff'd, 409 U.S. 942 (1972); NAACP v. Allen, 340 F.Supp. 703, 708-10, 4 FEP Cases 318 (M.D. Ala. 1972); Bradley v. School Board, 53 F.R.D. 28, 41-42 (E.D. Va. 1971); Morrow v. Crisler, 4 FEP Cases 674, 4 E.P.D. ¶ 7584 (S.D. Miss. 1971). See also Brewer v. School Board, 456 F.2d 943, 951-52 (4th Cir. 1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 98-102 (N.D. Cal. 1972). We note particularly that Cooper v. Allen, Harper v. Mayor, NAACP v. Allen and Morrow v. Crisler are cases which, like the suit here, were brought under 42 U.S.C. §§ 1981 and 1983 to vindicate the right to equal employment opportunities in the public sphere. We see no relevant distinction between them and the case at hand.

Defendants' second contention, that the award of attorneys' fees is barred by the Eleventh Amendment and

the doctrine of sovereign immunity,[17] has been rejected in the recent case Gates v. Collier, Civ. No. 73-1790 (5th Cir., December 5, 1973). The court there affirmed an award of attorneys' fees, stating:

"This Court has said that 'such a suit as this the award of attorney's fees is not an award of damages against the State, even though funds for payment of the costs may come from the state appropriations.

* * *

"Although the trial court had the power to assess attorney's fees and expenses against the individual defendants found to have engaged in the unconstitutional conduct, we think it does not vitiate the award because the trial court prescribed that this part of the costs were to be payable 'from funds which the Mississippi Legislature, at its 1973 Session, may appropriate for the operation of the Mississippi State Penitentiary,' and were not to be 'the personal, or individual, liability of the varied defendants or any of them.'" Slip op. at 12-13 (footnote omitted).

The issue has also arisen and been resolved adversely to defendants position here in Sims v. Amos, 340 F.Supp. 691 (M.D. Ala.) (three judge court), aff'd, 409 U.S. 942 (1972), and

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[17] No Eleventh Amendment or sovereign immunity problems would arise from an award of attorneys' fees against the individual defendants. Although the record might well justify such an award, it is nonetheless not within our power since the individual defendants were never properly brought before the court. Kirkland v. New York State Department of Correctional Services, 358 F.Supp. 1349, 1350, n. 1 (S.D.N.Y. 1973). Accordingly, attorneys' fees can only be awarded against the two defendant state agencies.

LaRaza Unida v. Volpe, 57 F.R.D. 94, 101, n.11 (N.D. Cal. 1972).

Plaintiffs ask the court to determine at this time the size of the award and have submitted affidavits upon which to base the determination. To accede to their request without providing defendants the opportunity of bringing to our attention facts relevant to determining the amount in question would be improper in view of the recent decision of the Court of Appeals for this Circuit in City of Detroit v. Grinnell Corp., Civ. No. 73-1211 (2d Cir., March 13, 1974). Accordingly, defendants are instructed to include in the memorandum discussed above any facts which they wish the court to bear in mind in determining the amount of attorneys' fees to which plaintiffs are entitled.

To sum up: Examination 34-944 is declared unconstitutional and is set aside. Defendants are enjoined from making permanent appointments to the position of Correction Sergeant from the eligible list which is based on its results and from terminating the provisional appointments to that position of plaintiff class members solely because of their failure to pass the examination. Defendants are instructed to submit a memorandum on the subjects delineated above within ten days of the filing of this Opinion, plaintiffs to reply within one week thereafter. Plaintiffs are awarded reasonable costs, including attorneys' fees, in an amount to be determined after further documentation by the parties.

It is so ordered.

APPENDIX F--DECREE OF DISTRICT COURT.

[CAPTION OMITTED]

FILED: July 31, 1974

LASKER, D.J.:

This action having been tried to the Court without a jury, and the Court having made findings of fact and conclusions of law by Opinion dated April 1, 1974 [7 EPD ¶9268] (374 F. Supp. 1361), declaring Examination No. 34-944, prepared by the Civil Service Commission of the State of New York and administered by the Department of Corrections of the State, for promotion to the grade of Correction Sergeant to be unconstitutional, and setting it aside; and the original parties hereto and the intervenors having filed memoranda in relation to the relief which should be afforded in accordance with the findings and conclu-

sions of the Court, and the Court having thereafter conferred with counsel as to the terms of such relief, it is Ordered, Adjudged and Decreed:

1. Examination No. 34-944 is declared invalid as violating the Constitution of the United States.

2. The defendants New York State Department of Correctional Services and New York State Department of Civil Services, and the named defendants Oswald, Poston, Stockmeister, and Scelsi, and their agents, employees, and successors in office are permanently enjoined from (a) making permanent or provisional appointments to the position of Correction Sergeant (Male) in the New York State Department of Corrections based upon the results of Examination No. 34-944 or any

eligible list promulgated pursuant to that examination; and (b) administering or promulgating eligible lists based upon, or in any way acting upon the results of, Examination No. 34-944 for the position of Correction Sergeant (Male).

3. The defendants, their agents, employees, and successors in office, are mandatorily enjoined to develop a lawful non-discriminatory selection procedure for the position of Correction Sergeant (Male). In so doing, they shall adhere to the following general guidelines:

(a) The new selection procedure shall be developed within the shortest practicable period.

(b) The new selection procedure shall be developed and, before usage for promotional purposes, validated in accord-

ance with the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. §1607.1 (1970), as those Guidelines are or as later revised.

(c) All validation studies pursuant to this decree shall be performed by means of empirical, criterion-related validation techniques insofar as feasible.

(d) The selection procedure to be developed may include a written examination, and may also include other selection instruments or procedures.

4. During the period required for the development of a lawful, non-discriminatory selection procedure for permanent appointments to the position of Correction Sergeant (Male), the Court will entertain requests by defendants or their

successors in office for permission to make such appointments under an interim procedure subject to the following provisions:

(a) Any such request shall set forth a statement of the circumstances which render such appointments necessary or desirable.

(b) The request shall specify the number of appointments to be made, and the desired effective date(s) of such appointments.

(c) The request shall set forth the nature of the interim procedure to be relied upon to select persons for promotion to Correction Sergeant (Male), and the reasons for employing that particular procedure, and the reasons assuring that the procedure will be based on

merit and fitness and will be non-discriminatory in effect.

(d) The request shall pledge, and the subsequent appointments shall reflect, that members of the plaintiff class shall receive at least one such promotion by the interim procedure for each three such promotions received by persons not members of the class defined herein. This numerical requirement shall be annulled at such time as the combined percentage of Blacks and Hispanics in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Blacks and Hispanics in the ranks of Correction Officers (Male).

(e) Copies of requests shall be submitted to counsel for plaintiffs or their designee when submitted to the

Court, and plaintiffs' comments thereon, made within no more than ten days or such shorter period as the Court may specify upon an appropriate showing of urgency by the defendants, will be considered by the Court.

5. Upon completion of the development of the revised selection procedures and subject to the Court's approval thereof, the defendants, their agents, employees and successors in office are enjoined from failing to appoint as permanent Correction Sergeants (Male) pursuant to the new procedures at least one Black or Hispanic employee for each three white employees so appointed, until the combined percentage of Black and Hispanic persons in the ranks of Correction Sergeants (Male) is equal to the combined

percentage of Black and Hispanic persons in the ranks of Correction Officers (Male).

6. The parties are directed to confer with a view to proposing jointly to the Court a detailed procedure for the execution of the steps set forth in this decree, if agreement is possible. The parties shall submit their joint or, if necessary, separate proposals as to these steps within thirty (30) days after the date of this decree. The joint or separate proposals shall provide for submission of any proposed selection procedure to the plaintiffs for review and to the Court for approval prior to the initiation of the selection procedure for promotional purposes.

7. The Court retains jurisdiction for such period as is necessary to supervise this decree and further proceedings thereunder, and to determine the reasonable value of plaintiffs' attorneys' services.

APPENDIX G--SUPPLEMENTAL ORDER,
SEPTEMBER 18, 1974.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf
of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES: RUSSELL OSWALD, individually and in his capacity as Commissioner of The New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION: ERSA POSTON, individually and in her capacity as President of the New York Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCEILSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants.

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APPENDIX G

Application having been made herein by defendants for clarification and/or supplementation of the Order and Decree of this Court dated July 31, 1974, regarding the appointment of provisional Correction Sergeants (Male) pending the implementation of the interim selection procedure for permanent appointments and/or the final selection procedure of permanent appointments, and argument having been had upon said application, and upon due consideration, it is

ORDERED, ADJUDGED AND DECREED that the Order and Decree of this Court in the above captioned action, dated July 31, 1974 be and hereby is supplemented as follows:

a. Defendants are authorized to make provisional appointments to the

position of Correction Sergeant (Male) pending the implementation of the interim selection procedure for permanent appointments and/or the final selection procedure for permanent appointments, subject to the conditions set forth herein, for a period not exceeding six (6) months unless extended by the court for good cause shown.

b. Said appointments shall be made only with the permission of the court upon five days written notice to the court and to the attorneys for the plaintiffs. Said notice shall set forth the number of appointments to be made and the reasons therefor and shall include, in summary form, the ethnic/racial identification of the prospective provisional appointees.

APPENDIX G

c. Prospective provisional appointees shall be advised that the duration of their appointments shall be no more than six (6) months unless extended for good cause shown with the approval of the court.

DATED: New York, New York
September 18, 1974

MORRIS E. LASKER
U.S.D.J.

APPENDIX H--OPINION OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 445, 499—September Term, 1974.

(Argued April 21, 1975 Decided August 6, 1975.)

Docket Nos. 74-2116, 74-2258

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

Before:

HAYS, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order and decree of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* invalidating as unconstitutionally discriminatory a Civil Service examination for sergeant in the New York State Department of Correctional Services.

Affirmed in part and reversed in part.

JUDITH A. GORDON, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Asst. Atty. Gen., Stanley L. Kantor, Asst. Atty. General, New York, N. Y., of Counsel), *for Defendants-Appellants.*

RICHARD ROWLEY, Esq., Albany, N. Y. (Sneeringer & Rowley, Albany, N. Y., of Counsel), *for Intervenors-Appellants.*

DEBORAH M. GREENBERG, Attorney, New York, N. Y. (Jack Greenberg, Esq. and Morris J. Baller, Esq., New York, N. Y., of Counsel), *for Plaintiffs-Appellees.*

ARNOLD FORSTER, Esq., New York, N. Y. (Joy Meyers, Attorney and Justin J. Finger, Esq., New York, N. Y., of Counsel), *for amicus curiae, Anti-Defamation League of B'nai B'rith.*

VAN GRAAFEILAND, *Circuit Judge:*

On October 14, 1972, the New York State Department of Civil Service offered examination 34-944 for promotion to the position of correction sergeant in the New York State

Department of Correctional Services. One thousand, two hundred sixty-three white correctional officers took this examination, and three hundred eighty-nine, or 30.8%, received a passing score. Of the one hundred four Blacks tested, eight, or 7.7% passed; of the sixteen Hispanics, two, or 12.5% passed. Thus was this litigation born.

On April 10, 1973, Edward Kirkland and Nathaniel Hayes, two Black officers who failed, joined with the Brotherhood of New York State Correction Officers, Inc., in instituting this civil rights class action[1] on behalf of their similarly situated fellow officers, seeking to enjoin any promotions to sergeant based on the results of the examination.

The case was tried before Judge Lasker in July of 1973, and this appeal is taken from his order and decree. Basically, the order provided as follows:

1. It declared examination 34-944 invalid as unconstitutionally discriminatory and enjoined defendants from making any appointments to sergeant based on the results thereof.

2. It mandatorily enjoined defendants to develop a lawful, non-discriminatory selection procedure for the position of sergeant, requiring that it be validated in accordance with the E.E.O.C.[2] Guidelines on Employment Selection Procedures and that all validation studies be performed by means of empirical, criterion-related validation techniques insofar as feasible. It also required that the proposed selection procedure

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1 Although the coverage of Title VII was enlarged in 1972 by the amendment of 42 U.S.C. § 2000e(a) to include governments, governmental agencies and political subdivisions, this action was brought under 42 U.S.C. §§ 1981, 1983.

2 Equal Employment Opportunity Commission.

be submitted to the plaintiffs for review and to the court for approval prior to its adoption.

3. It authorized defendants to request the court's permission for the making of interim appointments, with the provision that members of the plaintiff class receive at least one out of every four such promotions until the combined percentage of Black and Hispanic sergeants was equal to the combined percentage of Black and Hispanic correction officers.

4. It required that, following the development and court approval of revised selection procedures, defendants continue to promote at least one Black or Hispanic employee for each three white employees promoted until the combined percentage of Black and Hispanic sergeants was equal to the combined percentage of Black and Hispanic correction officers.

5. It awarded attorney's fees to plaintiffs as part of their costs, retaining jurisdiction in the court to determine the amount thereof.

Defendants have appealed from this order, contending primarily that examination 34-944 was job-related and therefore not unconstitutionally discriminatory; that the court erred in requiring future examinations be criterion-validated; that the imposition of promotion quotas was unjustified and constituted reverse discrimination; and that the award of attorney's fees was improper.

By order to show cause dated April 23, 1974, Albert M. Ribeiro and Henry L. Coons, correction officers who had taken and passed examination 34-944, sought leave to intervene as parties defendant on behalf of themselves and a class of similarly situated correction officers, alleging that they were indispensable parties, since the relief sought

by plaintiffs would deprive them of their personal and property rights without due process of law. This motion was granted, with the proviso that intervenors could not litigate any matters which they might have litigated had they been parties from the outset. Intervention was also limited to the petitioners as individuals and not as representatives of a class.

Intervenors also appeal from the final order and decree, urging as additional error that they should have been joined at the outset as indispensable parties. Since this latter contention involves the litigation at its inception, we will address ourselves to it first.

Dismissal for Non-Joinder

Intervenors' claim of indispensability is grounded upon the provisions of the New York Civil Service Law. The office of correction sergeant is in the competitive class under such law.[3] Article 5, Section 6, of the New York Constitution requires that appointments and promotions in the Civil Service "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive".

The Civil Service Law, following the mandate of the Constitution, requires the taking of competitive examinations and the appointment and promotion to covered positions from eligible lists promulgated from the results of such examinations.[4] Appointment or promotion is generally required to be made from one of the three persons standing highest on the eligible list.[5] When there is no appropriate eligible list available, provisional appoint-

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3 N. Y. Civil Service Law § 44 (McKinney 1972).

4 N. Y. Civil Service Law §§ 52, 61 (McKinney 1972).

5 N. Y. Civil Service Law § 61 (McKinney 1972).

ments or promotions are authorized, pending the creation of a new list;[6] and provisional appointees secure certain benefits which may be applied against future permanent appointments.[7]

The eligible list from the examination preceding 34-944 became exhausted in the Spring of 1972, and intervenors, together with some members of plaintiff class, received provisional appointments to correction sergeant. Intervenors were among the ninety persons who had passing scores on examination 34-944, and it was expected that all ninety would receive permanent appointments as sergeant. Such appointments were prohibited, initially by the District Court's temporary restraining order and finally by the order and decree appealed from.

That the intervenors were adversely affected by such orders can hardly be gainsaid.[8] However, this in itself is not determinative of their right to be joined as indispensable parties. When litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties.[9]

It may be that because of the "reverse discrimination" aspects of this case which will be discussed hereafter, intervention with the right to participate in the trial would have been appropriate if timely request therefor was

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6 N. Y. Civil Service Law § 65 (McKinney 1972).

7 N. Y. Civil Service Law § 52 (McKinney 1972).

8 *Castro* v. *Beecher*, 459 F.2d 725, 736 (1st Cir. 1972).

9 *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 366 (1940); *National Resources Defense Council, Inc.* v. *Tennessee Valley Authority*, 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972); *Sansom Committee* v. *Lynn*, 366 F. Supp. 1271 (E.D. Pa. 1973).

made.[10] However, that question is not before us. We hold that intervenors' argument that the complaint should have been dismissed because they were not joined as indispensable parties could not be made for the first time one year after the trial had been completed. At that late date, the test of "equity and good conscience" foreclosed any such rights which intervenors might possibly have had.[11]

That intervenors were aware of the litigation at its inception was clearly shown by the fact that the District Court's preliminary injunction prohibited their appointments. The orderly processes of justice do not permit that, with such knowledge, they may stand idly by until after an adverse decision is rendered.[12]

The Constitutionality of the Examination

Proof in employment discrimination cases proceeds from effect to cause. Plaintiffs establish the racially disparate consequences of defendants' employment practices, and defendants must then justify such consequences on constitutionally acceptable grounds.[13]

Plaintiffs herein contend that examination 34-944 had a disproportionate impact upon minority correction officers, and that defendants must therefore establish that the subject matter of the test bore a meaningful relationship to the duties of the office for which the test was given, *i.e.*, that it was "job-related".[14]

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10 *See, e.g., Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973).

11 *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968).

12 *Rios* v. *Steamfitters Local 638*, —— F.2d —— (2d Cir. June 24, 1975), Slip op. 4351, 4358 n.3.

13 *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

14 *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973).

The figures relied upon by plaintiffs are recited above; 30.8% of the Whites who took examination 34-944 passed, as contrasted with 7.7% of the Blacks and 12.5% of the Hispanics. Defendants, while not disputing the accuracy of these figures, contend that most of the racial disparity occurred at Ossining Prison which employs the largest group of minority correction officers and urge that any attack upon the examination should be limited to the employees at that institution. Defendants say that either there was no disparity at all at the other correction facilities or else that so few officers were tested at such facilities that no meaningful conclusions could be reached from the test results.

This argument completely overlooks the identity of job classifications in the State's penal institutions, the Statewide scope of examination coverage, and the mobility of employees throughout the correctional system. It also ignores the fact that the examination grades for minorities were uniformly lower at all of the State's facilities.

The District Court's refusal to fractionalize the examination by varying its application among the correctional facilities was therefore not clearly erroneous.

The District Court was likewise not convinced by defendants' argument that the results of the five sub-tests comprising examination 34-944 did not show a consistent racial disparity, particularly when broken down among the different correctional facilities. Since passing grades and promotion were dependent upon the cumulative results of the five sub-tests, we too see little relevance in this proof on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact.[15]

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15 *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Comm'n*, 360 F. Supp. 1265, 1272 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 387 (2d Cir. 1973). *See* note 13, *supra*.

In *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973), we stated that racially disproportionate impact need not be proven with complete mathematical certainty. Within the broad outlines of that rule, the District Court's holding that examination 34-944 had such disproportionate impact was not clearly erroneous. Defendants were therefore properly put to their proof to establish the job-relatedness of the examination under attack.

The District Judge's decision that defendants had not met the heavy burden thus imposed upon them was based largely upon his conclusion that the procedures employed in constructing examination 34-944 did not conform to professionally acceptable and legally required standards. Specifically, the District Judge held that the defendants had not performed an adequate job analysis and had too routinely followed the pattern of past practices. This approach was approved by us in *Vulcan, supra,* where we said that it was unnecessary for the trial judge to bury himself in a question-by-question analysis of the test.

Of course, the trial judge could not confine himself to an examination of the process of preparation while completely ignoring the merit of the result. However, since insufficient spadework usually results in a poor garden, evidence of unsatisfactory preparation imposed upon the defendants a heavier burden of demonstrating that they had created a satisfactory job-related examination.

The District Judge, without going into great detail, pointed out that certain items on the test involved guidelines that a correction sergeant would have no need to apply. He showed that the five sub-tests and their component parts were not weighted to reflect the relative importance of the job-related attributes being tested. He considered the expert testimony submitted by both sides

and stressed the fact that neither expert would characterize the examination as job-related.

We hold that Judge Lasker's finding that defendants had failed to carry their heavy burden of establishing the job-relatedness of examination 34-944 was not clearly erroneous, and we move to the question of the relief granted.

New Testing Procedures

Having declared examination 34-944 unconstitutionally invalid, the District Judge ordered the development of a "lawful non-discriminatory selection procedure". He also required that such procedure be validated in accordance with the E.E.O.C. Guidelines on Employment Selection Procedures[16] and that such validations be performed by means of empirical criterion-related validation techniques insofar as feasible.

In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), and again in *Vulcan, supra,* we described the several techniques for proving the validity of testing procedures which are professionally designated "empirical", "construct" and "content", and we see no need for further description in this opinion. In *Vulcan,* we went a step further. We said:

> "The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.' "

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16 29 C.F.R. §§ 1607.1 *et seq.* (1970).

However, since our decision in *Vulcan*, the Supreme Court in *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (U.S. June 25, 1975), has strongly endorsed the procedures outlined in the E.E.O.C. Guidelines which provide that evidence of content or construct validity may be appropriate "where criterion-related validity is not feasible".[17] While *Albemarle* is distinguishable from the instant case in that it is a Title VII action involving a private industrial employer, we think the District Court's similar preference for the E.E.O.C. Guidelines was not clearly erroneous.[18]

We do not construe the order of the District Court as going beyond the provisions of the Guidelines by requiring empirical validation regardless of feasibility. It seems clear that the problems involved in civil service testing are substantially different from those which confront a private employer who tests on a limited and non-competitive basis. These problems will, we are sure, be considered by the District Court should a dispute hereafter arise as to whether appellants' testing procedures have been empirically validated "insofar as feasible".

The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage.[19] If the District Judge is seeking professional assistance from plaintiffs' expert, his

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17 29 C.F.R. § 1607.5(a) (1970).

18 *Cf. Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

19 *Cf. Matter of Fitzgerald* v. *Conway*, 275 App. Div. 205 (3d Dep't 1949); *Matter of Belmont* v. *Kaplan*, 16 A.D. *aff'd* 13 N.Y. 2d 998 (1963) *(mem)*.

order should so provide; and proper steps should be taken to insure confidentiality.

The Imposition of Quotas

One of the most controversial areas in our continuing search for equal employment opportunity is the use of judicially imposed employment quotas.[20] The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.

The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited.[21] Commentators merely echo the judiciary in their disapproval of the "discrimination inherent in a quota system.[22]

Our court has approached the use of quotas in a limited and "gingerly" fashion. In *United States* v. *Wood Lathers, Local 46*, 471 F.2d 408 (2d Cir.) *cert. denied*, 412 U.S. 939 (1973), we approved an order based upon a consent decree which directed a union to issue a quota of work permits to minority workers. In *Bridgeport, supra*, we approved the use of hiring quotas for the Bridgeport Police Department. In *Vulcan, supra*, we affirmed an interim order for quota hiring of New York City firemen

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20 Note, Constitutionality of Remedial Minority Preferences in Employment, 56 Minn. L. Rev. 842 (1972). *See, e.g., Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974), *cert. denied* 417 U.S. 965 (1974).

21 Blumenrosen, Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675 (1974).

22 *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950); *see also* dissenting opinion of Mr. Justice Douglas in *De Funis* v. *Odegaard*, 416 U.S. 312 (1974), dissenting opinion of Judge Hays in *Rios* v. *Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974), and concurring opinion of Judge Feinberg in *Patterson* v. *Newspaper Deliverers Union*, 514 F.2d 767 (2d Cir. 1975).

"only because no other method was available for affording appropriate relief without impairing essential city services". 490 F.2d at 398. *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) imposed a specific racial membership goal upon a union. In *Patterson* v. *Newspaper Delivers Union*, 514 F.2d 767 (2d Cir. 1975), we approved a settlement which also involved union membership with an imposed quota system for the union's group classification system. In each of these cases, there was a clear-cut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination. In the instant case, there is insufficient proof of the former and substantial evidence of the latter.

This is a class action brought on behalf of one hundred seventeen persons who took and failed examination 39-944 or who passed but ranked too low to be appointed. The class was so designated by the District Court which found that the question of whether examination 34-944 discriminated against minority candidates was the question of law common to the class. The existence of such common question of law or fact was, of course, a prerequisite to the maintenance of a class action.[23]

At the outset of the trial, the District Judge indicated his desire to decide the case on the basis of 34-944 alone, and it is clear that the trial proceeded substantially on that basis. Some incomplete, and therefore unreliable, data were submitted with regard to the previous examination given in 1970, but plaintiffs concede, as they must, that there are no data in the record with respect to pre-1970 tests. There was proof of some present racial imbalance among supervisory correction personnel, but this had little probative value without statistical background

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23 Fed. R. Civ. Pro. 23(a).

data concerning the eligible correction officer labor pool from which minority supervisors could have been drawn. The testimony is undisputed that the duties of a correction sergeant have changed substantially over the years so that no retroactive inference concerning job-relatedness could be made as a result of examination 34-944 which was evaluated in relation to the job as it then existed. Finally, although this is not dispositive of the matter, there is no claim that defendants at any time acted without the utmost good faith or with intention to discriminate.

A comparison of respondent's proof with that considered by then District Judge Mansfield in *Chance* v. *Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972) is illuminating. Judge Mansfield's opinion shows that he reviewed the pass-fail statistics from fifty supervisory examinations taken by six thousand, two hundred one candidates over a seven-year period to ascertain the relevant racial and ethnic groupings. In the instant case, the litigation centered on one. As District Judge Weinfeld pointed out in the lower court opinion in *Vulcan*, 360 F. Supp. 1265, 1271 (S.D.N.Y. 1973), the consequence of relying upon one examination is "that any finding of discrimination and the relief to be granted will necessarily be restricted to the scope of the proof."

In view of the limited scope of the issues framed in this class action and the paucity of the proof concerning past discrimination, we feel that the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted.[24]

Moreover, once defendants have prepared a court-approved job-related civil service examination, a deliberate misuse of the resultant eligibility list on racial grounds

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24 *See Chance* v. *Board of Examiners*, 458 F.2d 1167, 1179 (2d Cir. 1972).

would seem to be violative of both the New York and the Federal Constitutions.

Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution.[25] In so doing, they "declared in unmistakeable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service",[26] and that merit must be ascertained as far as practicable by competitive examination.[27]

The Congress recognized the social benefits inherent in a system of promotion based upon merit when it provided that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide merit system".[28] As pointed out by the Court in *Griggs, supra,* Congress did not intend "to guarantee a job to every person regardless of qualifications".[29]

The attack upon the content of civil service examinations, illustrated by *Vulcan* and *Bridgeport,* merely heralds future confrontations between the advocates of equal employment opportunities and the supporters of our civil service system. In the offing, surely, is an attack upon the provisions of § 61 of the New York Civil Service Law which requires that appointment from an eligible list be made

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25 N.Y. Const. art. V, § 6 (1965).

26 *Palmer* v. *Board of Education,* 276 N.Y. 222, 226 (1937).

27 *Matter of Fink* v. *Finegan,* 270 N.Y. 356, 361 (1936).

28 42 U.S.C. § 2000e-2(h).

29 401 U.S. 424, at 430 (1971).

from one of the three persons standing highest on the list. It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators.

The courts of New York hold that one whose efforts secure for him a position upon a civil service promotion list "is entitled to consideration and protection in such position".[30] Whether this governmental benefit be termed a right or a privilege is of no significance; constitutional rights do not turn upon such issue.[31]

So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be "bumped" from a preferred position on the eligibility list solely because of his race.[32] Unless the Fourteenth Amendment is applicable only to Blacks, this is constitutionally forbidden reverse discrimination.[33]

The smaller the group participating in a civil service examination, the more pointed the problem becomes. We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights.

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30 *Barlow* v. *Craig*, 210 App. Div. 716, 719 (1st Dept. 1924); *Barlow* v. *Berry*, 245 N.Y. 500, 503 (1927).

31 *Sugarman* v. *Dougall*, 413 U.S. 634, 644 (1973).

32 Note Judge Feinberg's concern about "bumping" expressed in *U.S.* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

33 "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 209 (1944) (concurring opinion of Mr. Justice Murphy); *Commonwealth* v. *Glickman*, 370 F. Supp. 724, 736 (W.D. Pa. 1974).

A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be by-passed for advancement solely because they are white. As to such a situation, the following comments of Judge Mulligan in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission, supra,* are most pertinent:

> "We are discussing some 117 positions with time-in-grade requirements mandating three years' service as patrolman, sergeant and lieutenant postponing promotion to captain for a minimum of nine years. While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes." [34]

We turn now to the remedial relief ordered by the District Court, which is both interim and final in nature. As interim relief, the court ordered that if defendants wished to make any appointments pending the development of a new selection procedure, they might apply to the court for permission to do so. The court directed that at least one out of four of the persons so promoted must be members of the plaintiff class. Since this portion of the decree is interim in nature, does not mandate the making of any

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34 482 F.2d at 1341.

promotions, does not disregard an existing civil service eligibility list, and since its benefits are limited to the members of the plaintiff class, we affirm it as not being an abuse of the District Court's discretion.

Insofar as the order appealed from imposes permanent quota restrictions upon those who seek advancement by means of a court-approved job-related civil service examination, we reverse. The benefits of such order are not limited to the plaintiff class. Its quota requirements are based upon a shifting and rapidly expanding racial base, wholly unrelated to the consequences of any alleged past discrimination. It provides for appointment according to race without regard to the individual applicant's standing on a job-related examination and, indeed, without regard to whether the benefitted Black or Hispanic received a passing grade. It completely ignores the statutory requirements and constitutional purpose of the New York Civil Service Law and constitutes court-imposed reverse discrimination without any exceptional or compelling governmental purpose.[35]

Provisional Appointments

At the outset of the litigation, the District Court issued a temporary restraining order prohibiting defendants from terminating provisional appointments which had been made to members of plaintiff class. The terms of this order were carried over into Judge Lasker's opinion but were amended to state that such appointments might not be terminated solely because of plaintiffs' failure to pass examination 34-944. However, they were not incorporated into the final order and decree, and we cannot be sure that the District Court intended them to survive.

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[35] *See Matter of Board of Education* v. *Nyquist*, 31 N.Y. 2d 468, 475 (1973).

Appellants argue convincingly that under § 65 of the New York Civil Service Law provisional appointments are made only when there is no appropriate eligible list available for filling a vacancy and that therefore the making of such appointments bears no relationship to the constitutionality of examination 34-944. Appellants also argue that such order was discriminatory in that it applied only to minorities who failed the examination. We need not reach any of the foregoing questions, however, since, as we read § 65, provisional appointments are made only for periods of up to nine months and then terminate automatically unless a new provisional appointment is made. We do not read Judge Lasker's opinion as prohibiting termination for any reason unrelated to the failure to pass the examination or requiring the making of a new appointment at the end of the nine month provisional period.

ATTORNEY'S FEES

The District Court's award of attorney's fees cannot stand.

In *Stolberg* v. *Board of Trustees,* 474 F.2d 485 (2d Cir. 1973), we laid down the test of "unreasonable, obdurate obstinancy" on the part of the defendant as the determining factor in the award of counsel fees.[36] There is no claim of any such attitude on the part of defendants-appellants. Accordingly, we would have been reluctant to approve the awarding of counsel fees herein. In any event the matter has now been decided for us by the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 43 U.S. L.W. 4561 (U.S. May 12, 1975).[37]

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36 *See also, Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 497 F.2d 1112 (2d Cir. 1974).

37 Although an attorney may find lesser professional challenge in a Title VII proceeding than in an action under §§ 1981 and 1983, there are a number of reasons why the former procedure is preferable. The possibility of an award for attorney's fees is now one of them.

DISPOSITION

1. We deny intervenors' application to dismiss the complaint.

2. We affirm the District Court's order insofar as it invalidates examination 34-944 and directs the preparation of a new non-discriminatory examination procedure.

3. We affirm so much of the District Court's order as requires the new testing procedures to be validated by means of empirical criterion-related validation techniques if feasible.

4. We reverse so much of the District Court's order as requires the new testing procedure to be submitted to plaintiffs for review.

5. We affirm that part of the District Court's order which provides a procedure for interim appointments if desired by defendant.

6. We reverse so much of the District Court's order as provides for promotion by quota following the establishment of new civil service testing procedures.

7. We reverse that part of the District Court's order which includes counsel fees as part of plaintiff's costs.

8. We remand to the District Court for such further orders as are required by and consistent with this opinion.

APPENDIX I--ORDER ON REMAND, AUGUST 3, 1975.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants.

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- X

APPENDIX I

This action having been remanded to the Court by the Court of Appeals for Second Circuit for such further Orders as are required by the Court of Appeals opinion and order dated August 6, 1975 which affirmed in part and reversed in part the Order and Decree entered herein by this Court on July 31, 1974, it is

ORDERED:

1. That the Order and Decree of July 31, 1974 is vacated and that this Order shall substitute therefor in all respects.

2. Examination No. 34-944 is declared invalid as violating the Constitution of the United States.

3. The defendants New York State Department of Correctional Services and New York State Department of Civil

Service, and the named defendants Oswald, Poston, Stockmeister and Scelsi, and their agents, employees, and successors in office are permanently enjoined from (a) making permanent or provisional appointments to the position of Correction Sergeant (Male) in the New York State Department of Correctional Services upon the results of Examination No. 34-944 or any eligible list promulgated pursuant to that examination; and (b) administering, promulgating eligible lists based upon, or in any way acting upon the results of Examination No. 34-944 for the position of Correction Sergeant (Male).

4. The defendants, their agents, employees, and successors in office, are mandatorily enjoined to develop a lawful non-discriminatory selection procedure

for the position of Correction Sergeant (Male). In so doing, they shall adhere to the following general guidelines:

(a) The new selection procedure shall be developed within the shortest practicable period.

(b) The new selection procedure shall be developed and, before usage for promotional purposes, validated in accordance with the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. §1607.1 (1970), as those Guidelines are or as later revised.

(c) All validation studies pursuant to this decree shall be performed by means of empirical, criterion-related validation techniques insofar as feasible.

(d) The selection procedure to be developed may include a written examination, and may also include other selection instruments or procedures.

5. During the period required for the development of a lawful, non-discriminatory selection procedure for permanent appointments to the position of Correction Sergeant (Male), the Court will entertain requests by defendants or their successors in office for permission to make such appointments under an interim procedure subject to the following provisions:

(a) Any such request shall set forth a statement of the circumstances which render such appointments necessary or desirable.

(b) The request shall specify the number of appointments to be made, and the desired effective date(s) of such appointments.

(c) The request shall set forth the nature of the interim procedure to be relied upon to select persons for promotion to Correction Sergeant (Male), and the reasons for employing that particular procedure, and the reasons assuring that the procedure will be based on merit and fitness and will be non-discriminatory in effect.

(d) The request shall pledge, and the subsequent appointments shall reflect, that members of the plaintiff class shall receive at least one such promotion by the interim procedure for each three such promotions received by

persons not members of the class defined herein. This numerical requirement shall be annulled at such time as the combined percentage of Blacks and Hispanics in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Blacks and Hispanics in the ranks of Correction Officers (Male).

(e) Copies of requests shall be submitted to counsel for plaintiffs or their designee when submitted to the Court, and plaintiffs' comments thereon, made within no more than ten days or such shorter period as the Court may specify upon an appropriate showing of urgency by the defendants, will be considered by the Court.

6. The parties are directed to confer with a view to proposing jointly to

the Court a detailed procedure for the execution of the steps set forth in this decree, if agreement is possible. The parties shall submit their joint or, if necessary, separate proposals as to these steps within thirty (30) days after the date of this order or on such other date as the Court shall hereinafter specify. Separate proposals for interim or final selection procedures shall be transmitted to opposing counsel for comment. At the option of the Court, separate proposals prepared by defendants may be transmitted to a psychometrician designated by the Court who may comment thereon and consult with defendants. Any materials transmitted pursuant to this paragraph shall be held confidential by the individual(s) receiving them. Any violation

of this obligation of confidentiality shall be considered a contempt of this Court.

7. No selection procedure shall be administered without approval of this Court and the Court retains jurisdiction of this action for such period as is necessary to implement the provisions of this Order.

DATED: New York, New York
August 3, 1975

s/MORRIS E. LASKER
U.S.D.J.

APPENDIX J--ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of December, one thousand nine hundred and seventy-five.

Calendar Nos.—445, 499

74-2116
74-2258

EDWARD L. KIRKLAND, etc.,

Plaintiffs-Appellees,

—against—

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, etc.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, and a poll of the judges in regular active service having been taken, and Circuit Judges Mulligan, Timbers, Gurfein, VanGraafeiland, and Meskill having voted against en banc reconsideration, and Chief Judge Kaufman and Circuit Judges Mansfield and Oakes having voted in favor thereof, and an opinion by Circuit Judge Mansfield dissenting from denial of en banc reconsideration, in which Chief Judge Kaufman and Circuit

Judge Oakes join, and an opinion by Chief Judge Kaufman dissenting from denial of en banc reconsideration, having been filed,

Upon consideration thereof, it is

Ordered that said request be and it hereby is denied.

Circuit Judge Feinberg took no part in consideration of the question whether to grant rehearing en banc.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

MANSFIELD, *Circuit Judge* (Dissenting):

(With Whom Chief Judge Kaufman and Judge Oakes concur)

I dissent from the denial of an *en banc* hearing in this appeal because the decision potentially places us in conflict with previous decisions in this and other circuits and creates uncertainty regarding this circuit's law on a question of exceptional importance that has been and will be frequently encountered, i.e., whether, and under what circumstances, relief in the nature of a racial goal or quota may be imposed to remedy injury caused to a minority group by use of racially discriminatory methods to hire or promote persons from a pool of potentially eligible candidates. In my view this question should be resolved now for the guidance of district court judges, members of the bar and litigants in the Second Circuit, rather than leaving them in a state of confusion regarding the issue.

Until the decision in this case, while adopting a cautionary stance and acting "somewhat gingerly," we nonetheless repeatedly have held that where racially discrim-

inatory methods are used to hire or promote persons in violation of the civil rights of others, the district court should have the discretionary power to remedy the effects of the unlawful conduct and compensate the injured class by requiring the hiring or appointment of a higher percentage of minority applicants. *United States* v. *Wood, Wire & Metal Lathers, Local 46,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society of the New York City Fire Dept.* v. *Civil Service Commission,* 490 F.2d 387 (2d Cir. 1973); *Rios* v. *Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *Patterson* v. *Newspaper & Mail Deliverers Union,* 514 F.2d 767 (2d Cir. 1975).

The authority of a court of equity to issue such relief was recognized by the Supreme Court in *Louisiana* v. *United States,* 380 U.S. 145 (1965), where Justice Black, speaking for a unanimous Court, stated:

> "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154.

This was followed by the Court's recognition in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), that mathematical ratios might serve as a "useful starting point" in shaping a remedy for past constitutional violations. 402 U.S. at 25. Following this lead we, in *United States* v. *Wood, Wire & Metal Lathers, Local 46,* 471 F.2d 408 (2d Cir. 1973), approved an order directing a local union to take affirmative action to remedy the effects of past discriminatory practices in the issuance of work

permits by issuing 100 permits immediately to minority applicants, pointing out that

> "[W]hile quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not. *See* Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 n.47 (3rd Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30.L.Ed.2d 95 (1971); United States v. Ironworkers, Local 86, 443 F.2d 544, 553 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed. 2d 367 (1971); United States v. International Brotherhood of Electrical Workers, No. 38, 428 F.2d 144, 149 (6th Cir.), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); Local 53 of International Association of Heat & Frost I. & A. Workers v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970)." 471 F.2d at 413.

There followed our decision in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), wherein we upheld the use of a hiring quota to remedy the discriminatory effect of non-job-related examinations administered pursuant to the Civil Service provisions of the Bridgeport City Charter for the position of policeman, stating:

> "We commence with the basic tenet that the district court, sitting as a court of equity, has wide power and discretion to fashion its decree not only to prohibit present discrimination but to eradicate the effects of past discriminatory practices. Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 517, 13 L.Ed.2d 709

(1965); United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, 413 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). Although most of the cases dealing with the issue of past discriminatory practices arose under Title VII of the Civil Rights Act of 1964, Section 1983 cases have also granted relief by sanctioning quotas aimed at curing past discrimination. See, e.g., Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc); Castro v. Beecher, *supra*, 459 F.2d 725; Carter v. Gallagher, 452 F.2d 315, 327-332 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972)." 482 F.2d at 1340.

Again, in *Vulcan Society of the New York City Fire Dept.* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973), we approved the use of an interim quota to redress the discriminatory effect of non-job-related Civil Service examinations for the position of fireman and ordered the City to appoint one minority candidate for each three non-minority candidates appointed from a list of eligibles, stating:

"In arriving at a ratio midway between what would have been appropriate on the basis of correcting the inequities of Exam 0159 alone and the plaintiffs' demand for much more extensive relief, the judge took appropriate account both of the resentment of non-minority individuals against quotas of any sort and of the need of getting started to redress past wrongs. See Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, 413 (2 Cir.), cert. denied, 412 U.S. 939, 93 S. Ct. 2773, 37 L.Ed.2d 398 (1973). As the Supreme Court has stated, 'The framing of decrees should take place in

> the District rather than in Appellate Courts.' International Salt Co. v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947); *Chance, supra,* 458 F.2d at 1178." 490 F.2d at 399.

Finally, in *Patterson* v. *Newspaper & Mail Deliverers Union,* 514 F.2d 767 (2d Cir. 1975), we approved an affirmative-action promotion program which would achieve a quota by advancing minority News deliverers faster than non-minority workers in order to compensate the minority group for injury suffered under the previous discriminatory promotion program. The effect was to temporarily restrain the advancement of White workers who would have been promoted under a program of strict seniority.

The United States Supreme Court has not yet had the opportunity to offer clear guidance on the appropriateness or parameters of remedies or programs granting a preference to groups that previously were subjected to discriminatory treatment. See *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). But seven other circuits, recognizing that "[t]he framing of decrees should take place in the District rather than Appellate Courts," *International Salt Co.* v. *United States,* 332 U.S. 392, 400 (1947), and that the district judge, who is better acquainted with the background and details of the case, should have broad discretionary authority to fashion appropriate relief, have upheld the authority of the district court, in the exercise of its broad powers as a court of equity, to establish goals or quotas for the purpose of remedying harm caused by past discriminatory conduct. See, e.g., *Boston NAACP* v. *Beecher,* 504 F.2d 1017, 1026-27 (1st Cir. 1974) (upholding hiring by ratios until percentage of minority fire fighters equals their percentage in population); *Castro* v. *Beecher,* 459 F.2d 725, 737 (1st Cir. 1972) (Blacks and Spanish-surnamed police candidates who failed old, impermissible test but pass new validated one should

be placed in priority pool to be selected by ratio of 1:1, 1:2, or 1:3 with respect to others as determined by district court); *Pennsylvania* v. *O'Neill,* 473 F.2d 1029 (3d Cir. 1973) (en banc) (upholding by equally-divided vote power of district court to order Black-White hiring by ratio corresponding to Black overall population and number of Black applicants); *NAACP* v. *Allen,* 493 F.2d 614 (5th Cir. 1974) (upholding hiring of Black-White state troopers in 1:1 ratio until Blacks reach 25% of force); *Morrow* v. *Crisler,* 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974) (ordering district court to impose further affirmative relief to remedy discrimination in state police employment practices; may include 1:1 or 1:2 Black-White hiring, the freezing of White hiring, or "any other form of affirmative hiring relief until the Patrol is effectively integrated"); *United States* v. *Local Union No. 212,* 472 F.2d 634 (6th Cir. 1973) (upholding district court order mandating 11% Black membership in apprentice programs); *United States* v. *International Bhd. of Elec. Wkrs.,* 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970) (remanding to district court for consideration of appropriate affirmative relief); *United States* v. *United Bhd. of Carpenters,* 457 F.2d 210 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972) (remanding to district court for fashioning appropriate affirmative relief); *United States* v. *N.L. Industries,* 479 F.2d 354, 377 (8th Cir. 1973) (court can order Black-White promotion in 1:1 ratio until 15% of foremen are Black); *Carter* v. *Gallagher,* 452 F.2d 315, 331 (8th Cir.) (en banc), *cert. denied,* 406 U.S. 950 (1972) (district court may order the hiring of firemen in 1:2 Black-White ratio until 20 Blacks hired); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 553 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971) (district court can order immediate job referrals to previous discriminatees and require union

training program to select sufficient Black applicants to overcome past discrimination). But cf. *Harper* v. *Kloster*, 486 F.2d 1134, 1136-37 (4th Cir. 1973) (upholding district court's denial of quota relief).

Turning to the present case, the district court, in order to compensate minority correctional officers for the harm caused the minority group by the discriminatory state civil service promotional system, odered the defendants to promote minority correctional officers to the rank of sergeant on the basis of one minority for each three non-minority appointments until the combined percentage of minority sergeants equalled that of the minority correctional officers. Once this goal was satisfied, defendants, of course, would be entirely free to select sergeants solely through the application of a non-discriminatory, validated examination. In adopting this relief Judge Lasker exercised the authority granted by our above-cited decisions. Yet despite the reasonableness of Judge Lasker's decree, this court's decision denies quota relief once a permissible test is created, seeking to distinguish our earlier decisions on the grounds (1) that there was insufficient proof of a "clear-cut pattern of long-continued and egregious racial discrimination" and (2) that there was substantial evidence that a quota would result in "identifiable reverse discrimination," thereby violating the Constitutions of New York and the United States as well as New York's Civil Service Law. With due respect, the first ground is not supported by the record before us and the second does not distinguish this case from all the previous instances where we have endorsed the use of hiring goals.

With respect to the nature and extent of past discrimination it is undisputed that the 1972 examination for promotion from correctional officer to sergeant was unconstitutionally discriminatory. If, by "egregious racial discrim-

ination" Judge Van Graafeiland means *intentional* or deliberate conduct, the law is settled that the existence of deliberate and intentional racial discrimination is not a condition precedent to the granting of quota relief. See *Bridgeport Guardians, Inc., supra,* where such relief was granted despite the fact that there was "no showing that the test [Civil Service test for appointment as policeman] was deliberately or intentionally discriminatory," 482 F.2d at 1336, and *Vulcan Society of the New York City Fire Dept., supra,* where in granting quota relief, the court made clear that proof of non-job-relatedness of the examinations was sufficient to satisfy the requirement of invidiousness, thereby placing the burden of justification upon the City's shoulders. 490 F.2d at 391 n.4. Although the defendants here did not maintain pass-fail data according to race or color for the examinations prior to 1972, there was ample evidence to support Judge Lasker's finding of prior racial discrimination in the state's promotional process. As of May 1, 1973, for instance, all 122 permanent sergeants were white. The pre-1972 examinations were prepared by the same process as the non-job-related 1972 examination, which did not meet constitutional standards, and resulted in the appointment of only two Blacks and no Hispanics to the rank of sergeant or above. Of 997 Whites and 46 Blacks and Hispanics who took the examination for sergeant in 1970 and who continued to be employed by the defendants in 1973, 9.4% of the Whites and 0% of the non-Whites passed. Although 25 Black correctional officers employed at the Ossining Correctional Facility took the examination for sergeant in 1968 and 10 to 15 Blacks took the examination in 1965, none passed. Surely this proof, all pointing in the direction of past unlawful discrimination against minority candidates, was at least sufficient to shift the burden of justifying the earlier examina-

tions to the defendants, see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Vulcan Society, supra,* 490 F.2d at 393; *Boston Chapter of NAACP, supra,* 504 F.2d at 1019. Yet, there is no indication that the defendants ever attempted to sustain this burden.

To reject the imposition of a minority quota as a compensatory remedy on the ground that it would discriminate in reverse against eligible White candidates for promotion ignores the district court's duty as a court of equity to remedy past wrongs. It should be recognized that at a minimum the plaintiff class in this case included a definite, identifiable group of aggrieved non-White individuals—those already in the correctional system who, while previously qualified for advancement, nonetheless failed to be promoted due to the application of the discriminatory test. Given the fact that the Whites who benefited from the discriminatory system retain their promotions, the aggrieved non-White members of this minority group would deserve quick promotion even under the most traditional notions of compensatory relief. The obvious problem is that, because discriminatory examinations were used, we are unable to identify those White correctional officers who were wrongfully promoted to sergeant and those Black correctional officers who under a non-discriminatory system would have been promoted. This problem, however, does not justify the court's throwing up its hands and entirely rejecting a goal as a means of making whole the injured members of the minority group. The effect of such rejection, of course, is not only to deny some non-White correctional officers the long overdue promotions to which they were entitled, but, by requiring them to compete afresh with late-comers once a non-discriminatory test is devised, it postpones their promotions even further. Thus the court's decision hardly promises to make whole the injured members of the minority group.

Although the court justifies its action partly on the ground that Judge Lasker's order permits appointment without regard to the individual applicant's comparative standing on a job-related examination or even to his receiving a passing grade, this represents but one facet of the relief, which can easily be rectified by providing that once a valid test is available, the correctional authorities legitimately may decide to test these non-White officers anew. Should they pass the valid test, however, they should be promoted preferentially without having to experience the delay of further competition on equal terms with those newcomers who never were previously aggrieved. See, e.g., *Castro* v. *Beecher*, 459 F.2d 725, 739 (1st Cir. 1972) (district court should mandate hiring of those in preferential pool as compared to others by ratio of 1:1, 1:2, or 1:3).

Thus the effect of the court's action is to provide wholly inadequate relief to those aggrieved. When one considers the other alternative remedy that might be employed to provide more effective relief, the use of a temporary goal or quota looks even more attractive as a salutary exercise of discretion. That alternative remedy, which would adhere most closely to the merit principle, would be to void and recall all past promotions made on the basis of the previous non-validated tests, since they were the products of unlawful discrimination in violation of the Equal Protection Clause, having served to "bump" eligible non-White applicants in favor of Whites. Such relief, however, would be extremely harsh, for by giving a fair opportunity to those minority officers who had been denied that opportunity under the discriminatory scheme, it would also serve to strip some White sergeants of a status that they already have come to enjoy and that they might have achieved even under a non-discriminatory system.

Faced with a choice of relief measures, the district court wisely chose to select the imposition of temporary goals

as the less drastic remedy. In analogous contexts, such as school desegregation cases, the Supreme Court has not hesitated to uphold the district courts' discretionary power to strike a fair balance and fashion an equitable remedy that compensates racial minorities for wrongs done, even though Whites as a class may be forced to accept undesired burdens. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22-31 (1971); *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969) (upholding faculty assignment to schools by White-Black ratio); *Green* v. *New Kent County School Board,* 391 U.S. 430 (1968).

It is true that if promotion of the non-Whites in the existing and identifiable pool of correctional officers failed to satisfy the quota, the effect of Judge Lasker's decree would be to benefit some Blacks as a group at the expense of some Whites. This might explain the court's concern for "reverse discrimination." But all of the previously cited cases both in this circuit and outside have now established that such temporary burdening of Whites as a group is often necessary to effectively compensate for wrongs done to minority groups. As I hope I have shown, no remedy is perfect. Each must of necessity require some persons to forego some benefits. The advantage of an appropriately tailored goal or quota is that it goes the farthest toward remedying past wrongs with the least harm to others.

The fact remains that past non-job-related Civil Service examinations have resulted in the promotion of Whites only, denying eligible non-White applicants the chance to qualify on the basis of merit. Thus the Civil Service system, albeit not deliberately, was used to "bump" eligible minority applicants in favor of Whites. It would be ironic to allow adherence to the same civil service system, per-

version of which has caused the racial imbalance in promotions, to be used as a shield against an effective remedy for the wrong done in its name.

Nor can our prior decisions granting quota relief be distinguished on the ground that they dealt with unidentifiable White candidates rather than individually-identifiable qualified and eligible persons. In *Vulcan* the district court's interim decree upheld by us, under which the City would be required to appoint one minority candidate from the Civil Service eligibility list for each three non-minority candidates appointed, deferred appointment of some non-minority candidates "who had qualified under [Civil Service] Exam 0159 but had not yet been appointed." 490 F.2d at 391. Thus the non-minority group, some of whom intervened in the action, were "readily identifiable candidates for promotion," who, "regardless of their qualifications and standing in a competitive examination . . . [might] be by-passed for advancement solely because they are white," see *Kirkland* v. *New York State Department of Correction, supra,* Slip Opin. at 5413. Similarly, in *Bridgeport Guardians, Inc.* the intervening defendants included persons "who have a high standing on current eligibility lists, and presumably would be appointed to the force but for the decision below," 482 F.2d at 1334. Likewise in *Patterson* v. *Newspaper & Mail Deliverers, supra,* we upheld a quota against challenge by 100 identifiable News White workers who were permitted to intervene for the purpose of challenging the quota relief on the ground that its effect would be to "bump" White workers in favor of minority workers. 514 F.2d at 769.

All of this is not intended to denigrate the problems of fairness and justice raised by the White intervenors in these cases. But references to "identifiable" Whites, while perhaps placing the consequences of a goal into sharper

focus, do not add to the reality that, irrespective of the identifiability of the Whites, a goal inevitably serves to benefit some at the expense of others and that this court as well as most others nonetheless have come to recognize its necessary inclusion in the district court's remedial arsenal. The wisest and fairest course that we could follow is not to reject this remedy but to specify the smallest quota in terms of percentage and duration necessary to correct the past discrimination. See, e.g., *Rios, supra,* 501 F.2d at 628 n.3; *Vulcan Society, supra,* 490 F.2d at 399. This heretofore clearly has been our policy and the goal proposed by the district court in this case is perfectly in line with previously tolerated remedies.

For these reasons I believe it is unfortunate that the court has not seen fit, by hearing this case *en banc,* to seize this opportunity, absent guidance from the Supreme Court, to clarify our position with respect to the constantly recurring and troublesome question presented.

KAUFMAN, *Chief Judge* (Dissenting):

I concur in my brother Mansfield's scholarly opinion. I should like to add the following thoughts, however. As Judge Mansfield's opinion makes clear, this Court has traveled too far along the road of temporary "goals" as a remedy for past discrimination to permit a single panel to appear to reverse the course consistently followed. It is my view that we can retrace the steps taken by previous panels of this Court only by an en banc, F.R.A.P. 35(a), or by a Supreme Court holding that our earlier decisions have been in error. I am still of the view that the en banc device is often cumbersome and unproductive of the definitive resolution for which it is invoked, *see, e.g., Rodriquez* v. *McGinnis,* 456 F.2d 79 (2d Cir. 1972) (en banc), *rev'd*

sub nom. Preiser v. *Rodriguez*, 407 U.S. 919 (1973). But, the issues in the present case are so sharply defined and our prior holdings so clearly applicable that an en banc would have achieved the goal of "maintain[ing] uniformity of [our] decisions." F.R.A.P. 35(a).

APPENDIX K--INTERVENORS' COMPLAINT - CLASS ACTION.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

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DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON, VINCENT DIGIORGIO, ROBERT VERCILE ROSE, and RAYMOND E. FRISS, BRUCE MESERVEY,

Intervenors-Defendants.

- X

Intervenors Fitzpatrick, *et al.*, by their attorneys Rowley and Forrest, P.C., respectfully allege for their Intervenors' complaint that, upon information and belief:

THE PARTIES

1. Intervenors are all over the age of 21 years and are residents and domiciliaries of the State of New York and citizens of the United States of America.

2. Intervenors are all duly employed by the New York State Department

of Correctional Services [D.C.S.] in the permanent rank of Correction Officer, a position within the classified Civil Service of the State of New York.

3. Intervenors are all applicants for the permanent classified Civil Service position of Correction Sergeant. All of the Intervenors took New York Civil Service Examination No. 36-435, "Correction Sergeant." Intervenors DiGiorgio, Rose and Friss filed timely objections and pursued the appeals procedure promulgated by Defendants vis-a-vis the performance evaluation portion of test 36-435. All of the Intervenors wish to object to the underlying construction and application of 36-435 and to the proposed Order and Judgment which has been submitted to this Court on or

about September 26, 1979, including but not limited to the portion of said proposed order granting minority candidates a 250 point addition to their scores.

4. All of the proposed Intervenors believe that if this Court signs said proposed order, they will be deprived of their rights to equal protection of law and due process of law as secured to them by the Fourteenth Amendment to the United States Constitution, and their rights to Civil Service appointment and promotion based on objectively and competitively ascertained merit pursuant to *N.Y. Constitution*, Article V, §6, *N.Y. Civil Service Law*, and the Rules and Regulations adopted pursuant thereto.

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JURISDICTION

5. Plaintiffs commenced this action under 42 U.S.C. §§1981 and 1983 and 28 U.S.C. §§1343 (3) and (4) and have not made any claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000 e. *et seq.*). This Court has taken jurisdiction over all questions relating to the validity and application of exam 36-435, and the procedures surrounding that exam, and this Court has pendant jurisdiction over any causes of action arising under the laws of the State of New York concerning the validity or implementation of 36-435, and the making of Civil Service appointments pursuant thereto.

6. Intervenors invoke the jurisdiction of this Court under 42 U.S.C.

§§1981 and 1983; 28 U.S.C. §§1343 (3) and (4), the Fourteenth Amendment to the United States Constitution, 28 U.S.C. § 1331; *N.Y. Constitution*, Article V, §6, *N.Y. Civil Service Law* and the Rules and Regulations pursuant thereto, and the jurisdiction assumed and exercised by this Court in this action.

7. All actions of Defendants complained of were taken under color of State law.

8. The value of Intervenors' claims, individually and as aggregated, exceed $10,000.00 in value and arise under the Constitution of the United States, insofar as Intervenors allege the deprivation of equal protection of law.

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9. None of the proposed Intervenors are members of minority groups for the purposes of the proposed order.

10. Intervenors seek an order permitting their intervention pursuant to Federal Rule 24 on the grounds that they have valuable rights and interests in competing for, and being appointed to, the position of Correction Sergeant, and they are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect these interests. Intervenors believe that existing parties may not adequately represent their interests, or the interests of persons similarly situated.

11. In the alternative, Intervenors respectfully request this Court to order

the joinder of all applicants for the position of Correction Sergeants whose rights and interests in obtaining appointment as a permanent Correction Sergeant will be affected by the Court's actions in connection with the proposed order of September 26, 1979 presently before this Court.

12. This complaint is being served and filed pursuant to the Order of this Court rendered on September 26, 1979, at a hearing before Hon. Morris E. Lasker, District Court Judge, on the proposed Order submitted by the Attorney General.

13. In prior decisions and orders of this Court, including but not limited to the decision and order rendered on December 18, 1978 on the motion of various proposed Intervenors to enjoin the

promulgation of any eligibility lists or appointments based upon exam 36-435, this Court has expressly or by necessary implication held that it would consider all issues concerning the legality and validity of test 36-435 and associated procedures before signing any order which would allow eligibility lists to be promulgated or appointments to be made based on that exam. The original order of this Court, as modified by the Circuit Court of Appeals, directs that a lawful and valid examination for Correction Sergeant be drawn up and administered.

14. Intervenors believe that their claims are typical of the claims of a class made up of a large number of the Correction Officers who took the exam, and who either oppose the use of the

non-written portions of the exam as being inherently subjective, discriminatory and subject to bias, or the awarding of a 250 point differential to minority candidates, or who object on both bases. The class includes both applicants who filed objections and are pursuing appeals from the performance evaluation portion of the exam, and those applicants who did not file such objections or pursue the appeals procedure. For reasons hereinafter set forth Intervenors believe that the appeals process does not afford a reasonable opportunity to obtain the relief sought by Intervenors. The class is so numerous that joinder of all members is impracticable; the question of law or fact with regard to the non-written portion of Exam. No. 36-435 and the proposed

250 point differential are common to the class; and, the named Intervenors will fairly and adequately protect the interests of the class. This action is properly maintainable under FRCP 23(b)(1)(B), (2) and (3). The questions as to the legality of the non-written portion of Exam No. 36-435 under the N.Y. Constitution, the N.Y. Civil Service Law, and the Rules and Regulations adopted pursuant thereto; the questions as to the legality of imposing a *defacto* quota system upon the results of an examination purported to be lawful, constitutional and validated in accordance with EEOC Guidelines; and, the questions of due process and equal protection of the laws presented herein are all common to the class members.

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THE NATURE OF THE CLAIMS OF INTERVENORS

A. THE CONSTITUTIONALITY AND LEGALITY OF EXAM NO. 36-435

15. The New York Civil Service Commission and Department of Civil Service have been and are under mandate of this Court to prepare a legal and valid examination for Correction Sergeant. Intervenors believe that legality includes compliance with *N.Y. Constitution*, Article V, §6 and *N.Y. Civil Service Law* and the Rules and Regulations pursuant thereto.

16. The Civil Service Department of the State of New York administered a competitive Civil Service examination for Correction Sergeant on or about October 5th, 1978. The preparation and adminis-

tration of such examinations is governed by the applicable provisions of the New York State Constitution, New York Civil Service Law, and the Rules and Regulations of the New York State Civil Service Commission and the New York State Department of Civil Service and the prior orders of this Court.

17. The examination was administered to all of the applicants for appointment as Correction Sergeants, which group included the named Intervenors and some 800 other applicants.

18. Upon information and belief, the scores obtained by the applicants on the written portion of the Sergeant's examination have been combined with the scores obtained by the applicants on performance rating scores promulgated by

present Correction Sergeants and Lieutenants who were assigned the task of rating the applicants during August and September of 1978, all in accordance with the procedures set forth in the announcement of the Sergeant's examination. A copy of that announcement, marked Exhibit A, is annexed hereto and made a part hereof.

19. The performance evaluations are not assigned a definite weight compared with the written examination in the formula set forth in Exhibit A for ascertaining the final score. The announcement states in part that:

> "The relative weights used in producing these combined scores [on the performance evaluations and written examination] will be determined by considerations of

> test reliability and validity. Each candidate's five performance-area scores will then be weighted as shown on the chart above and summed. The candidate's final score will be based on this sum."

20. The performance ratings were arrived at pursuant to the procedures set forth in a document entitled: "Manual-Performance Rating - Correction Sergeant - Examination No. 36-435." A copy of that Manual, together with the annexed text of introductory remarks by Commissioner Richard Van Zandt of the Department of Correctional Services [D.C.S.], marked Exhibit B, is annexed hereto and made a part hereof.

21. The scoring system makes the performance evaluations paramount, as the announcement provides that:

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> "A candidate who received a rating below 70 in any performance areas will fail the examination and be disqualified from eligibility for appointment."

Thus, even a perfect score on the written portion of the examination could not offset a sub-70 score awarded by the raters.

22. The Manual for evaluations (Exhibit B) contains general descriptions of the types of conduct in selected facets of the job of Correction Officer. The Manual outlines in brief paragraphs "benchmarks" for performance, allegedly corresponding with scores of 95, 85, 75, 65, and 55. These paragraphs set forth behavior of Correction Officers in four "Dimensions" or general areas of performance, which are listed in the

Application (Exhibit A). The descriptive paragraphs are labeled "Performance Behavior."

23. The descriptive paragraphs concerning "Performance Behavior" are replete with generalities and vague standards for evaluation, requiring highly subjective application by the Sergeants and Lieutenants making the ratings. For example, Dimension III covers "Taking effective, positive direct action in security situations." The behavior allegedly corresponding with a score of 95 includes an analysis of whether a Correction Officer "Is alert in searching out and preparing for potential incidents" and whether he or she "Acts efficiently and positively in taking charge at the scene of a disturbance." Evaluation of

a Correction Officer's alertness, efficiency, and positive attitude require very subjective judgments. The last criterion for a 95 is that "As a result of his reports, there has been a substantial improvement in situations that may cause incidents." Since an evaluation of what situations may cause incidents is a speculative enterprise, evaluating the effect of reports on potential incidents is, of necessity, subjective.

24. The performance behavior paragraph in Dimension III corresponding to a score of 85 requires an evaluation of whether a Correction Officer "Applies good judgment in his response to incidents." Since a conception of what actions are in exercise of good judgment varies greatly from individual to indi-

vidual, evaluation of "good judgment" is highly subjective. The behavior corresponding to a score of 85 also includes an evaluation of whether or not a Correction Officer's reports are written fairly, another subjective judgment relying on the rater's individual concepts of fairness.

25. The behavior in Dimension III corresponding to a score of 75 includes whether or not a Correction Officer's responses are "usually appropriate and effective." The behavior corresponding to 65 includes an analysis of whether an Officer "...fails to appreciate and respond appropriately..." to aspects of a situation. "Appreciation" is a wholly internalized mental process, and "appropriately" is subject to a wide range of

interpretation. Whether or not reports are "adequately written" is another area of subjective evaluation. The score of 55 involves an evaluation of whether a Correction Officer "misappraises the security implications of situations...," again calling for an evaluation of internal mental processes as applied to unspecific situations. Awarding a score of 55 also requires an analysis of whether the applicant "...does a poor job of preparing written reports on disturbances..." and whether he "Often omits important facts, complaints, or incidents that have a great bearing on the investigation." Again, individual raters would have differing opinions on whether or not an applicant's reports were poor, or what facts are important in a report.

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26. Upon information and belief, the other evaluation criteria set forth in Exhibit B are comparably inexact, subjective, and unrelated to any concrete situations. They both invite and necessitate largely subjective and speculative evaluations of applicants.

27. No mechanisms were designed or applied to prevent the raters from making evaluations of applicants based on personal animosity, bias, or prejudice against the applicant. Moreover, there were no mechanisms employed to insure that the raters were equally familiar (or unfamiliar) with the applicants whom they rated. With the rotating shifts and transfers of personnel from institution to institution, it is likely that in many cases the raters were personally

acquainted with some of the Correction Officer candidates being rated, and partially or wholly unfamiliar with others. Since the criteria in Exhibit B require a subjective analysis of performance based on personal observation, the quality of the evaluations would vary with the relative familiarity or unfamiliarity of the raters with the Correction Officers being rated. As one example, it would seem difficult or impossible to fairly evaluate an Officer who had recently transferred into the institution where the rating was performed.

28. Correction Sergeants who acted as raters did not have available to them when rating applicants the personnel files of the applicants maintained by D.C.S., and Exhibit B contains no indica-

tion that material in the personnel file was to be considered in arriving at the ratings. Again, the emphasis was based on the subjective appraisal of the candidates by the raters.

29. The rating boards did not personally interview the applicants being evaluated. Those rated did not, and do not, know the identity of their raters.

30. The "Instructions" in Exhibit B required written comments on the rating form only when a rating of less than 70 or more than 90 was awarded. Upon information and belief, in the majority of cases, the raters were not required to set forth any justification for their ratings. Thus, there could be no effective control over ratings made without a sufficient factual basis.

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31. The rating procedures provided for two raters for each candidate. Differences between the two were to be resolved by compromise if there was a disparity of more than five points (although failing a compromise, the scores were to be averaged). This compromise procedure allowed and encouraged further discussion and application of the subjective feelings of the raters concerning the applicants to the rating procedures.

32. The use of a subjective based rating procedure, where a low rating in any of the four "Dimensions" spells failure on the entire exam, violated the rights of the applicants under the *N.Y. Constitution*, the *N.Y. Civil Service Law*, the Rules and Regulations of the New York Civil Service Commission and New York State

Department of Civil Service, and applicable legal precedents, to be evaluated so far as practicable by written examination, and by supplementary evaluative procedures free (insofar as possible) of bias, subjectivity and lack of uniformity.

33. All prior examinations for Correction Sergeant and Correction Lieutenant have consisted wholly of written examinations and have led to the employment of a satisfactory body of officers. There has been no change in circumstances which would make it impossible or undesirable to have a wholly or predominently written examination for Correction Sergeant.

34. *N.Y. Constitution*, Article V, §6, provides in part that appointments

and promotions within all divisions of the Civil Service of the State "...shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." The rating of small groups of applicants by various panels under a rating procedure allowing and promoting subjective and biased ratings, and the use of such ratings alone to absolutely exclude some applicants from appointment is contrary to the concept of competitiveness as set forth in Article V, §6.

35. *N.Y. Civil Service Law*, §50, as interpreted and applied by the Courts of the State of New York, requires the use whenever possible of objective and competitive examinations. The examination

procedures herein do not meet the standards articulated in the relevant precedents.

36. The evaluation portion of the Sergeant's examination does not meet the criterion enunciated in authoritative precedents of the New York Courts that the examination employ an objective standard which is capable of being challenged and reviewed by other examiners of equal ability and experience. It would be impossible to ascertain on review of the evaluations the precise information concerning or opinions of, the applicants used by the members of the rating panels, especially since they only have to provide written justification in limited circumstances.

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37. *N.Y. Civil Service Law*, §52(2) provides that promotion in the Civil Service shall be based on merit and fitness, but provides that:

> "The previous training and experience of the candidates, and performance ratings where available, may be considered and given due weight as factors in determining the relative merit and fitness of candidates for promotion."

However, as set forth in relevant precedent under that Section, the use of pre-existing written ratings, not ratings specifically prepared for the examination, are the only types of ratings which should be used. In this case, the prior personnel records of the applicants were disregarded by design.

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38. The Rules and Regulations of the *New York Civil Service Commission* (*4 N.Y.C.R.R.*) provide in Section 3.5, entitled "Rating of examinations":

> "(a) The subjects of an examination shall be given such relative weights as the president of the commission may prescribe; provided, however, that in a promotion examination, credit granted for seniority and for performance rating may be applied by the addition of points to the average scores earned by passed candidates in the other parts of the examination."

39. The examination procedures employed in the Sergeant's exam were in violation of this rule. Rather than providing for the mere adding of credit for performance to the written test scores, the procedures herein provided for a

combining of the performance ratings with the written test scores to produce a single score. The announcement does not even set forth the relative weight to be given to each component. Moreover, the performance rating is permitted to totally dominate the written test scores, as applicants must obtain a passing rating in each of the four rating areas before he or she is eligible to obtain a combined rating-written test score. This procedure illegally reverses the procedure in 4 *N.Y.C.R.R.* §3.5.

40. The term "performance rating" is a term of art as used in the *Civil Service Law* and the Rules and Regulations adopted pursuant thereto.

4 N.Y.C.R.R., §35.1, "Definition of terms", defines performance rating thusly:

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> "(a) The term performance rating shall mean an annual summary judgment of the value of an employee's performance and conduct prepared by his supervisors for the purpose of determining the employee's eligibility for salary increment and promotion. Such summary judgment shall be recorded only as 'satisfactory' or 'unsatisfactory.'"

Thus, references in *N.Y. Civil Service Law* to the term "performance rating" do not encompass the evaluations made herein as a part of the testing procedures for Correction Sergeant. 4 *N.Y.C.R.R.* §35.2 makes the part of the Rules and Regulations defining "performance rating" applicable to all competitive Civil Service employees in the Executive branch of State government, which includes all Correction Officers.

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41. Even if the performance rating procedures set forth in 4 *N.Y.C.R.R.*, Part 35, were applicable to the evaluations performed as a part of the Sergeants Exam, the procedures set forth in Part 35 were not followed. That Part provides for notification to the employee and an appeal procedure from unsatisfactory ratings. Section 35.5(a)(2) provides that "...no employee shall be rated by a provisionally-promoted supervisor with whom he may compete in a promotion examination." Some of the evaluations in the sergeants exam were performed by provisionally appointed Sergeants, and by provisional Lieutenants. The latter would have an interest in excluding as many candidates as possible from becoming Sergeants.

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42. The Sergeants performing evaluations could not be totally impartial, as required by the applicable precedents, in grading a group of applicants who would automatically become competitors with present Sergeants for any positions for Correction Lieutenants which might, in the future, be the subject of further competitive examinations.

43. Intervenors and members of the class will be irreparably harmed if eligible lists are promulgated or appointments made therefrom on the basis of the 1978 Sergeants exam, as they would thus be deprived of their valuable rights under the New York and United States Constitutions, the *N.Y. Civil Service Law*, and the Rules and Regulations adopted pursuant thereto, and the cases

decided pursuant thereto, to have their eligibility for promotion to Sergeant decided on the basis of a competitive, even-handed, unbiased, and objectively scored exam. They would further be deprived of their Constitutionally protected rights to equal protection and due process of law as protected by the Fourteenth Amendment.

44. The N. Y. Department of Civil Service has notified applicants of their right to pursue an appeals procedure vis-a-vis their performance evaluations. The appeals procedure was communicated to applicants during the summer of 1979. Approximately 400 of the 800 applicants have filed objections and are pursuing the appeals procedure.

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45. Intervenors have been informed by officials of the Department of Civil Service that the investigation and determination of those appeals has not yet begun, and that a matter of months will pass before the appeals procedures are completed. Those applicants appealing then can review the determinations under *N.Y. Civil Practice Law and Rules*, Article 78.

46. Of the named proposed Intervenors Vincent DiGiorgio, Raymond E. Friss and Robert Vercile Rose filed appeals from their performance evaluations. However, the remainder of the named Intervenors and the class which they represent wish to contest the unconstitutionally and illegally subjective nature of

the exam as a whole and the proposed 250 point differential for minorities.

47. Insofar as the appeal procedure purports to permit (or provide an opportunity for) the review of the legality of the exam procedures as a whole, it is patently deficient and futile. First, it consists of an appeal to the very body which developed the examination. Second, this Court has complete jurisdiction over, and the corresponding duty to rule on, the legality and validity of the exam procedures. Third, the applicants cannot be expected to have the legal expertise and knowledge and the technical understanding of testing procedures sufficient to frame sufficient objections to the test procedure as a whole.

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48. The existence of the appeals process is insufficient to obviate the illegal subjectivity of the performance evaluation component of the test. Applicants did not, and do not, know the identity of those who rated them. They were unable to adequately frame any objections they might have had based on the identity or personal bias of their raters. Moreover, the standards and methodology employed *in fact* by the raters could not have been known to applicants at the time that they filed objections. Those class members pursuing appeals do not have available to them adequate discovery mechanisms for prosecuting a meaningful appeal.

49. The large number of appeals is evidence of the rampant and obvious bias,

impropriety, and invalid standards underlying the performance evaluations.

50. Intervenors believe that this Court should before signing the proposed order or making any adjudication as to the validity of exam 36-435, conduct a hearing or other procedures consonent with basic principles of due process whereat the issues as to the legality and validity of the test can be fully adjudicated.

51. Alternatively, this Court should make no ruling on the validity of the examination procedure until such time as the appeals procedure is completed, as the merit, scope and disposition of those appeals bear directly on the legality and validity of the exam.

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52. Intervenors and the members of the class will be deprived of the protection of due process of law as mandated by the Fourteenth Amendment if this Court signs the proposed order absent any hearing or further inquiry into the validity and legality of the exam procedures.

53. Many of those members of the class who did not file objections to the overall nature of the test refrained from doing so because they were aware of the pendency of the action and believed that this Court would review all questions concerning the legality and validity of the exam.

54. If this Court allows the establishment and use of an eligibility list based on scores obtained on exam 36-435, Intervenors and the members of the class

will be deprived of their rights to an essentially competitive and objective examination procedure absent any over-riding state interest justifying an overly subjective exam procedure, and will be deprived of valuable rights in public employment as secured to them by *N.Y. Constitution*, Article V, §6, *N.Y. Civil Service Law*, the Rules and Regulations adopted pursuant thereto, and equal protection and due process of law, as protected by the Fourteenth Amendment to the United States Constitution.

B. INTERVENORS' CAUSE OF ACTION BASED UPON THE APPLICATION OF A 250 POINT DIFFERENTIAL TO THE RAW SCORES OBTAINED ON EXAM. NO. 36-435

55. The proposed order submitted to this Court on or about September 26, 1979, requests that this Court award a 250

point differential to the composite scores on the entire exam for Black and Hispanic candidates.

56. The granting of such a differential constitutes a quota system in another guise, and results in reverse discrimination against a limited and ascertainable group, i.e., non-minority applicants who will be ranked absolutely and relatively lower on the resultant eligibility list owing to the award of the differential.

57. That discriminatory result of the awarding of the differential is violative of the rights of the proposed Intervenors and the class to due process and equal protection of law as protected by the Fourteenth Amendment, and a deprivation of their valuable rights in public

employment to be appointed to Civil Service positions on an objective and competitive bases as mandated by *N.Y. Constitution*, Article V, §6, and *N.Y. Civil Service Law*.

58. If exam 36-435 is held to be criterion valid, then its valid results should be applied even-handedly to generate an eligibility list based solely on the composite scores on the exam.

59. Plaintiffs have not brought this action under Title VII of the Civil Rights Act of 1964, but rather under the Fourteenth Amendment's equal protection clause. Even if EEOC Guidelines, *arguendo*, permit the use of a differential, this Court does not have the power to order a differential in a Section 1983 action based on equal protection, since

such a differential is violative of equal protection concepts.

60. Nothing in *N.Y. Civil Service Regulations*, §67.1(g) authorizes such a differential, and even if it did, an allowance of the use of differentials would be void under *N.Y. Constitution*, Article V, §6.

61. Plaintiffs have not demonstrated a history of deliberate past discrimination by the State of New York so as to justify the use of a differential. Even if such discrimination had been proven, Intervenors and the class members were not the beneficiaries of, any past discrimination so as to justify the reverse discrimination resulting from differentials.

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62. The application of differentials in the proposed order would deprive numerous non-minority candidates, the identity of whom cannot now be precisely ascertained, of the valuable right or privilege of appointment as Correction Sergeant with the corresponding salary increase, emoluments, benefits, and rank, to the irreparable harm of such applicants.

63. Annexed hereto and incorporated herein as Exhibit C are the affidavits of Dennis Fitzpatrick, Vincent DiGiorgio, Robert Vercile Rose, and Raymond E. Friss, named Intervenors, and the affidavits of Ronald Van Deusen, Duane Overbaugh, Raymond Cornelison, John Casey, and Paul Murphy, all of whom with the exception

of Paul Murphy, served as evaluators for the non-written portion of exam number 36-435.

WHEREFORE, Intervenors respectfully request this Court to grant the following relief:

(a) ORDER and ADJUDGE that the proposed Intervenors be granted permission to intervene, for all purposes pursuant to FRCP Rule 24 or, in the alternative, that all of the applicants who took exam number 36-435 be joined as parties to this action.

(b) ORDER, ADJUDGE and DECLARE that exam number 36-435 is unlawful and invalid under N.Y. Constitution, N.Y. Civil Service Law and under the due process and equal protection provisions of the Four-

teenth Amendment to the United States Constitution.

(c) ORDER and ADJUDGE, in the alternative, that a hearing be held forthwith at which Intervenors may present relevant testimony and evidence as to the illegality and unconstitutionality of the performance evaluation portion of exam number 36-435.

(d) ORDER and ADJUDGE, that Defendants either promulgate and administer a new Correction Sergeants' exam which conforms to the N.Y. Constitution and relevant provisions of N.Y. Civil Service Law, or, in the alternative, rescore exam number 36-435 so that the scores are based solely upon the written portion of said exam.

(e) ORDER and ADJUDGE that the use of the differential set forth in the proposed order presently before this Court or any other device to elevate the scores of Blacks and Hispanics who took exam number 36-435 are illegal as a form of reverse discrimination, and are violative of the rights of the non-minority applicants for exam number 36-435 to equal protection and due process of law as secured to them by the Fourteenth Amendment.

(f) Enjoin Defendants from promulgating any eligibility list pursuant to exam number 36-435 or making any appointments pursuant thereto, or from applying any differential or similar adjustment (or other quota device) to the scores of minority, Black, or Hispanic applicants in connection with exam number 36-435.

(g) GRANT to Intervenors the costs, legal fees and disbursements of this action.

(h) GRANT such other and further relief as may be just and proper.

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By /s/ Jeffrey G. Plant
JEFFREY G. PLANT
A member of the firm.

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EXHIBIT A--ANNOUNCEMENT OF EXAMINATION ANNEXED TO INTERVENORS' COMPLAINT.

NEW YORK STATE DEPARTMENT OF
CIVIL SERVICE ANNOUNCEMENT

COMPETITIVE PROMOTION EXAMINATION

Written Test To Be Held
August 28, 1978

Applications Must Be Postmarked
No Later Than
July 31, 1978

NO. 36-435 CORRECTION SERGEANT G-17

THIS EXAMINATION IS OPEN TO ALL QUALIFIED EMPLOYEES OF THE DEPARTMENT OF CORRECTIONAL SERVICES

QUALIFYING EXPERIENCE:

For Taking The Test: On or before the date of filing application, candidates must have had two years of permanent competitive service as a Correction Officer or Correction Officer (Spanish-Speaking).

Both male and female Officers are eligible to compete in this examination.

Candidates permanently appointed to a qualifying title on or before August 12, 1976 and who have served continuously in this title since that date, shall be deemed to meet

the Qualifying Experience For Taking The Test.

For Appointment From The Eligible List: four years of the above experience.

THE EXAMINATION: The examination will consist of a performance evaluation and a written test, covering the performance areas of the job as revealed by the job analysis. The areas, their relative weights, and the tests for them are as follows:

Performance Area	Relative Weight	Performance Evaluation	Written Test
1. Maintaining security and control standards in assigned area	2	x	x
2. Establishing and maintaining effective relations with program staff, civilians, and visitors	1	x	x
3. Taking effective positive direct action in security situations	2	x	x
4. Controlling inmate movement, activities and behavior	1	x	x
5. General supervision of Officers	2		x

You May Obtain Announcements and Promotion Application Cards, XD-5, From Your Agency Personnel Office

S-5/SPES-wc

ISSUED: 6-30-78

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The Performance Evaluation Procedure: The performance evaluations will be conducted during August, 1978. Ratings will be made by rating boards drawn from a panel of permanent supervisors at each correctional facility. A number of boards will be established at each facility. The ratings will be based on observations, reports, and other objective sources of information on job performance.

The board will assign each candidate ratings for performance areas 1 through 4 listed above. The minimum passing score for each performance area is 70; candidates must achieve at least 70 in each of the four performance areas included in the performance evaluation. A candidate who receives a rating below 70 in any performance area will fail the examination and be disqualified from eligibility for appointment.

The Written Test: The written test will be made up of multiple-choice questions. It will cover the five performance areas of the job.

Final Scores: Candidates who receive passing ratings in all four areas of the performance evaluation will have their performance ratings and written test scores combined so as to produce a score for each of the five performance areas. The relative weights used in producing these combined scores will be determined by considerations of test reliability and validity. Each candidate's five

performance-area scores will then be weighted as shown in the chart above and summed. The candidate's final score will be based on this sum.

A minimum final score will be required in order for a candidate to pass the examination and be placed on the eligible list.

Points will be added to an eligible score as follows:

Seniority . . . . For Each Year 0.2

NOTE:

1. The written test will be held at Correctional Facilities throughout the State. Qualified applicants will automatically be scheduled to take the test at a facility based on the location at which they are currently employed at the time the test is held.
2. In filling out the Promotion Examination Application (XD-5), applicants should *omit* Box #6, but be sure to fill in the name of the facility where they are employed in Box #10.
3. Any person, otherwise meeting the requirements for an examination, who was laid off from an agency for which the examination is behing held, and whose name *is presently* on a preferred list is eligible to compete in the examination. When completing their applications, such

persons should be sure to indicate their present State employment and/or the title and location of their last permanent State employment. Refer to your copy of "Rights and Benefits Available to Employees Separated From State Service."

4. The New York State Legislature has recently changed the dates of service in the Korean Conflict, for eligibility for veterans credits, to: June 26, 1950 to and including January 31, 1955 (this amends the information given on the Application Form under "Veterans Credits").

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EXHIBIT B--TEXT OF INTRODUCTORY REMARKS BY COMMISSIONER RICHARD VAN ZANDT AND MANUAL OF PERFORMANCE RATING ANNEXED TO INTERVENORS' COMPLAINT.

Hello, I'm Richard VanZandt, Assistant Deputy Commissioner for Facility Operations. I spoke to many of you last year about the importance of performance evaluation to the Department's overall personnel program, especially in relation to job analysis and examinations.

Many of you provided performance evaluations of persons under your supervision and also self-evaluations which have been analyzed by the Civil Service Department staff, the results indicated that the activities and tasks of the Sergeant position are grouped into five job dimensions.

Results were reviewed by an advisory group of Corrections line personnel,

drawn from the several types of facilities throughout our system.

They established the relative importance of the job dimensions and developed the appropriate performance rating standards. This information has recently been reviewed and compared to current information. Now we are about to apply these performance standards to those individuals competing in the Sergeant's examination.

The ratings which you will provide will be combined with the result of the written test to produce an eligible list for Sergeant. My purpose is to make sure that every rater understands the rating process, to insure that every ratee receives an objective evaluation.

First, who will rate.

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Every candidate will be rated by two raters. The raters have been recommended by your facility as the supervisors best able to objectively evaluate the ratee's performance. Because of your differing assignments some of you will have more, and some fewer, ratees assigned to you for evaluation. You will be given a list of the ratees assigned to you.

Second, what is to be rated.

You will evaluate the ratee's job performance related to each of four dimensions of a Sergeant's job. These are:

1. Maintaining security and control standards in assigned area;

2. Establishing and maintaining effective relations with program staff, civilians and visitors;

3. Taking effective positive direct action in security situations;

4. Controlling inmate movement, activities and behavior.

The fifth performance dimension, general supervision of Correction Officers, will not be evaluated by this rating. But it will be covered by the written test. A separate score will be assigned for each area. There is no overall rating. The final score will be derived from a combination of the scores obtained from the performance evaluation and the written test. Each rating area is described in the Rater's Manual by posting the tasks and activities which exemplify it. Seventy (70) is the minimum passing score. Remember that the ratee must achieve a minimum passing

score in each rating area--a failing score in any one area will disqualify him for appointment. For this reason, if one rater passes a ratee, and the other fails him, and they cannot reconcile their judgments, the ratee will be assigned a passing score of 70 in that area.

Third, what is the rating standard and procedure?

Each rater will rate independently. The standard rating scale for each dimension is contained in the Rater's Manual. Five benchmark descriptions are provided for each dimension (at scale values of 55, 65, 75, 85, and 95). These descriptions were drawn from the job analyses for Sergeant and Officer. The scale values of these descriptions were assigned as appropriate to select and evaluate Sergeants.

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Ratings will be assigned on a scale from 50 to 100, with 70 as the minimum passing rating. To determine a score for a ratee, compare his performance in the job area being rated to the benchmark performance descriptions. If his performance matches one of them, assign him the corresponding score. If his performance level falls between two of the descriptions, assign him the middle score of 60, 70, 80, or 90. If his performance is worse than the 55 benchmark, you can assign a score of 50. If his performance is better than the 95 benchmark, you can assign him a score of 100. To repeat, scores can range from 50 to 100. The minimum score interval is five points. Therefore, all scores must end in either a zero or five. (No 72's or 83's.)

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It is essential that the ratee's performance is always compared to the Standard Rating Scales found in the Rater's Manual. This will maintain a uniformity of standards among the many raters involved in the process. Fourth, there are several situations which require that the rater <u>further</u> justify the ratings which he has given. These are:

1. <u>Any</u> rating less than 70.
2. <u>Any</u> rating greater than 90.
3. If there is a disagreement between the two raters of more than five (5) points on any dimension, then each rater must justify the rating he gave for that dimension. If, after discussion, a rater decides to change his rating, he must justify the new rating.

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A candidate's rating on a dimension will be the average of his two ratings on that dimension, unless there is any disagreement over pass/fail. For example, if one rater assigns a rating greater than 90, while the other rater gives a score less than 70, and, after discussion, the conflict cannot be resolved, the candidate will be assigned a score of 70 on that dimension.

Monitors will be available with more information. I'm sure you will exercise objective, fair and professional judgment in your evaluation; and provide the Department with a supervisory staff of the highest quality.

Thank you.

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MANUAL

Performance Rating

CORRECTION SERGEANT

Examination No. 36-435

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INTRODUCTION

You are participating in a procedure to select permanent Correction Sergeants, as described in the announcement given you. Your task at this time is to assign performance ratings to designated subordinates on each of four job dimensions of the Correction Sergeant job.

This manual is to assist you in arriving at objective and fair ratings. It contains definitions of the four job dimensions to be rated, the rating standards to be used, and a sample copy of the rating form.

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INSTRUCTIONS

USE OF THE RATING SHEET:

Ratings

You will have a rating form for each ratee. The form contains the names of the job dimensions, and boxes for Rating and a Revised Rating. Begin by identifying yourself and the ratee in the boxes at the top of the form. Enter your and the ratee's names and ranks, etc. on the lines marked with an X.

Your ratings for each job dimension are to be entered in the boxes under Rating. When you have assigned a rating for each dimension, sign and date the form at the bottom on the signature line to the left. When you have completed forms for all your ratees, turn them in to the monitor, who will check them for completeness.

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Justification of Ratings

All ratings of less than 70 or more than 90 must be supported with comments relating the ratee's performance to the performance rating standards at the appropriate level. Enter comments on the back of the rating form.

Comments must be specific to the dimension and standard level being supported, drawn from your knowledge and experience of the ratee's performance.

There are other situations requiring comments, described below under Revised Ratings.

Revised Ratings

There are two raters for each ratee. If the raters disagree on the rating for any dimension, the monitor will return the rating forms to them for supporting

comments, discussion and possible revision. You do not have to revise your rating. If, however, as a result of the discussion you change your rating, enter your new rating in the box under Revised Rating, and supporting comments for the new rating on the back of the form. Do not erase the old rating. If some dimensions require revision and some do not, mark an X in the Revised Rating box for those which do not. Finally, sign and date the form at the bottom on the signature line to the right if you have revised ratings for any dimension(s).

Differences between raters of more than five points in the rating assigned for any dimension require supporting comments and discussion. If such a difference in passing scores cannot be recon-

ciled, the scores will be averaged. Also, any disagreement on passing or failing requires discussion, even if the difference is five points. The passing score for a dimension is 70. Less than 70 in any dimension fails the ratee for this entire selection procedure. If a difference in passing and failing scores cannot be reconciled, the ratee will pass, for that dimension, with a score of 70.

DETERMINING THE RATING

A separate rating is to be assigned for each dimension.

Compare the ratee's performance in the dimension you are rating to the standard performance behavior descriptions. If his performance level is equal to one of the descriptions, assign him the corresponding score. If his performance

level is between two of the standard descriptions, for example, better than the 75 description, but not so good as the 85 description, assign him a score of 80. If his performance is better than 95 you can give him a 100; if worse than 55 you can give him a score of 50.

Using this procedure, you can assign scores of 50, 55, 60, 65, 70, 75, 80, 85, 90, 95 or 100. No other scores can be assigned. Your rating for the dimension must be one of the above.

Use your full supervisory knowledge of the ratee's performance to rate him. Always compare his performance on the dimension to the standard in this manual, and base your ratings on the comparison. Rate each dimension separately.

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A score of 70 is the minimum passing score for a dimension. A score less than 70 will fail the candidate on that dimension, and since a candidate must pass on all dimensions to continue in the competition, will effectively fail the candidate for the entire examination.

THE RATING DIMENSIONS

There are four areas of performance to be rated:

1. Maintaining security and control standards in an assigned area.

2. Establishing and maintaining effective relations with program staff, civilians, and visitors.

3. Taking effective, positive direct action in security situations.

4. Controlling inmate movement, activities and behavior.

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Each is defined in this manual by a Performance Rating Standard, which contains a general description of the area covered, and descriptions of performance behavior with corresponding rating scores for this selection procedure. The dimensions, and the score value of the performance behavior descriptions, were established as a result of job analysis of the Sergeant and Officer jobs.

Read the Standards carefully. Make sure you understand what each dimension is covering, the differences among them, and the differences between levels within a dimension.

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PERFORMANCE RATING STANDARD

CORRECTION SERGEANT

DIMENSION I

Maintaining security and control standards in an assigned area.

Inspects area for cleanliness, order, potential safety and health hazards, and risks to security. Checks security and safety equipment in area. Observes and evaluates actions and behavior of individuals within his area. Prepares and/or reviews logs and reports covering his area. Notifies appropriate individuals when corrective action is required within his area.

PERFORMANCE BEHAVIOR	SCORE
Makes thorough periodic inspections of security equipment in his area. Does not rely on visual inspection but physically checks bars, gates, locks, etc. and follows up to insure needed repairs are made. Extablishes clear standards and guidelines for persons in his area. The area he is responsible for usually exceeds most security, safety, and sanitary standards set by the facility and the Department.	95
Continually monitors his area for security, safety, and cleanliness.	

APPENDIX K

Visits his area of responsibility frequently and at irregular intervals. Follows up on situations to assure correction of security and safety hazards. Area ready to stand inspection at any time. 85

Acts appropriately in response to area conditions. Recognizes and reacts appropriately to various types of contraband. Accurately and completely reports overtime and absences: needs little or no checking in this matter. Logs are correct and informative. Controls supplies and equipment. 75

Makes visual only inspections of security equipment in his area. Does not respond to security and safety conditions except on complaint. Is lax on reporting equipment needing repairs and does not follow up to insure that repairs were made. Logs and records are not complete or correct. Reports on incidents that occur in his area usually are not adequately written, and a poor job is done of documenting the underlying causes. 65

Is slipshod in inspection of his area and takes no action to correct unsanitary or unsafe conditions. Supplies are usually short and equipment defective in his area. Does not inform inmates of proper behavior and actions

expected of them. Cannot prepare an adequate report on area conditions. The area he is responsible for usually falls short, in one way or another, of meeting security, safety, and sanitary standards set by the facility and the Department. 55

PERFORMANCE RATING STANDARD

CORRECTION SERGEANT

DIMENSION II

Establishing and maintaining effective relations with program staff, civilians, and visitors.

Cooperates and coordinates with civilian staff in his area. Relates well to visitors, and answers visitor questions in accordance with rules of the Department. Relates well to outside groups (e.g. JC, NAACP) and to special programs involving them.

PERFORMANCE BEHAVIOR	SCORE
Keeps abrest of program offerings within the facility in sufficient detail to answer inmate questions, and is able to put inmates in contact with appropriate program staff. Takes the initiative in dealing with	95

civilian staff. Suggests improvements in programs occurring in his area.

Listens carefully to inmate questions and complaints about program, and attempts to answer them if within his power. Promptly forwards questions and complaints to appropriate source or authority, and checks to see that they are answered. Participates actively in special programs involving visitors and outside groups. Coordinates his activities with program schedules. 85

Cooperates with program and civilian staff when necessary. Makes appropriate referrals of inmates. Stays within department rules and regulations around programs and visitors. 75

Avoids involvement in special programs or with visitors. Cannot relate well with the civilian and volunteer staff; has trouble coordinating programs staffed by these people. Has an ineffective working relationship with training and shop personnel and has difficulty cooperating with them in inmate rehabilitation and training programs. 65

Makes no effort to try to refer inmates to appropriate sources. Refuses to cooperate with program staff, or participate in special programs, unless ordered specifically to do so. 55

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PEFORMANCE RATING STANDARD

CORRECTION SERGEANT

DIMENSION III

Taking effective, positive direct action in security situations.

Anticipates possible emergency situations. Notifies others when appropriate. Responds to situation promptly. Acts within rules to alleviate problems as quickly as possible with minimum use of force. Reports on incident. Investigates the causes of an incident.

PERFORMANCE BEHAVIOR	SCORE
Is alert and active in searching out and preparing for potential incidents. Acts efficiently and positively in taking charge at the scene of a disturbance, directing action to minimize the disturbance, and getting prompt treatment for any injured. As a result of his reports, there has been a substantial improvement in situations that may cause incidents.	95
Recognizes potential problems. Informs his subordinates and superiors of potential problems, and instructs his subordinates on correct procedures. Applies good judgment in his	85

response to incidents. Reports on incidents that occur in his area are written fairly and the causes are investigated thoroughly to prevent any recurrence.

Moves quickly to area of disturbance and takes charge. His response to conditions and incidents is usually appropriate and effective. Incidents are handled by him or his subordinates with minimum necessary force. 75

Is sometimes lax in relaying information on potential inmate problems to those above and below him in the chain of command. Usually is minimally effective in directing action at the scene of a disturbance. Reacts to some aspects of a situation but fails to appreciate and respond appropriately to others. Needs assistance in handling incidents and acts only on instructions of superiors. Reports on incidents that occur in his area usually are not adequately written and a poor job is done of documenting the underlying causes. His reports have generated little, if any, improvement in situations or attitudes that cause incidents. 65

He misappraises the security implications of situations. Does not take charge in situations which clearly call for it. Any inmate fights, assaults, etc., in his area usually result in either an over-reaction 55

where too much force is used or an under-reaction where control is lost and additional help must be summoned. Usually cannot conduct an adequate investigation into a disturbance. Usually does a poor job of preparing written reports on disturbances. Often omits important facts, complaints, or incidents that have a great bearing on the investigation.

PERFORMANCE RATING STANDARD

CORRECTION SERGEANT

DIMENSION IV

Controlling inmate movement, activities and behavior.

Corrects improper inmate behavior. Advises inmates with respect to problems, programs, and behavior. Listens to and evaluates complaints and/or ideas from inmates. Inmates within his area are involved in programs. Inmates within his area cause few disciplinary problems. Observes movement and congregation of inmates. Escorts inmates inside/outside facility.

PERFORMANCE BEHAVIOR SCORE

Knows inmates' histories and situations and uses them to interpret and

assess situations. Seeks out information not routinely provided on inmate behavior and needs. Successfully encourages and motivates inmates to attend programs that he believes will help them. Makes sure that all necessary jobs in the area are filled and matches inmates with jobs based on interest and appropriateness. 95

Establishes and enforces clear standards for inmate behavior. Continually checks inmate participation in programs and activities. Answers any inmate questions or complaints regarding rules, regulations, responsibilities, opportunities, programs, and goals within the facility: checks on answers he does not know and gets back to the inmate promptly. Listens to inmates' problems and objectively discusses them with inmates to try to help them come to a solution or acceptance of such problems. 85

Inmates' movements are well-controlled and without incidents. Inmates in his area are actively engaged in programs. Listens to inmate complaints and acts on them where appropriate. Observes congregations of inmates within his area to detect possible signs of trouble: notices obvious abnormalities. 75

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Inmates under his supervision have minimal participation in the prison's rehabilitation programs. Often, inmates in his area are not properly informed of facility rules or activities. Never or only occasionally bothers to refer inmate to professional staff to seek assistance with personal problems. Listens to inmate complaints, makes little effort to determine the justification of the complaints, makes little effort to remedy the complaints independently, and forwards them no matter what the nature of the complaints. 65

Does not inform inmates of proper behavior and actions expected of them. His approval and disapproval of inmate behavior are not based on clear standards or guidelines. Refuses to listen to inmates or interact with them beyond absolute requirements. Makes no effort to try to refer inmates with questions to appropriate sources. Inmates are hard to locate in his area. Has trouble overseeing an orderly transfer of groups of inmates within the facility. Usually does not exercise adequate control over inmates in such a situation. 55

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EXHIBIT C--AFFIDAVITS ANNEXED TO INTERVENORS' COMPLAINT.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

DENNIS FITZPATRICK, being duly sworn, deposes and says:

1. I am employed as a correction officer by the Department of Correctional Services at the Great Meadow Correctional Facility located in Comstock, New York. I make this affidavit on behalf of myself and other correction officers similarly situated for use in the pending Federal Court litigation which deals with the promotional sergeants' exam and evaluation rating system used and proposed by the Department of Correctional Services.

2. During the month of October, 1978, I took the written portion of the

promotional examination for correction sergeant given by the Department of Corrections in conjunction with the New York State Civil Service Department.

3. I was advised that a number of persons taking that examination have commenced a legal action in Federal Court objecting to the content, scoring system, and proposed use of the written examination by the Department of Correctional Services, based upon allegations that the examination and rating system is in some way discriminatory against Black and/or Hispanic correction officers.

4. I was advised and believed that the entire system of promotions to the rank of Sergeants, based in any way on the October, 1978, examination and rating system were to be governed by Federal Court orders.

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5. I have not received notification of my score on the written examination which I took in October, 1978.

6. I have received a "performance evaluation rating" from the Department of Correctional Services which I understand is to be used in conjunction with the written examination in determining eligibility for promotion to the rank of Correction Sergeant.

7. I was notified that I could object to the performance evaluation rating by filing a written objection within ten (10) days after receiving the rating. However, I did not file such a written objection, based upon the belief that the use of the rating system was subject to Federal Court order, and that objections to the entire system used or

proposed by the Department of Corrections for promotions to Sergeant positions was being litigated in Federal Court.

8. I was never advised who compiled my performance evaluation rating. Prior to receiving my performance rating scores, I was not advised what aspects of my job would be evaluated, who would be making such evaluations, or how such evaluations were to be used. Upon information and belief, the performance rating does not adequately reflect the various duties involved in my job as a correction officer.

9. I have not filed any written objection to the written portion of the sergeants' exam as I have not yet been advised of my score. However, I have been advised that the Department of

APPENDIX K

Corrections has proposed adding a certain number of points to the scores of certain individuals taking the examination in an effort to offset differences in scores obtained by different racial, cultural or ethnic groups.

10. If the written examination taken by me in October of 1978 was to objectively test abilities to perform duties normally performed by correction sergeants, I believe any adjustment to the scores of such test, based upon race, cultural or ethnic background would be improper, unfair and unconstitutional in that it would most likely have a discriminatory effect upon correction officers taking the test who would be ineligible for such additional points.

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11. I believe that the Department is mandated by law to make promotions to the position of correction sergeant based strictly on merit and ability and that it is required to test merit and ability objectively insofar as possible. If the test I have taken was meant to test that ability, I strongly object to the addition or subtraction of any points from any candidate's score based upon race, cultural or ethnic heritage which, I believe, has no effect on test scoring or ability to perform the duties of a correction officer or a correction sergeant.

12. If the written objective examination is to be used for determining eligibility for promotions I believe it must be based upon objective criteria and performance and that it would be

discriminatory to add or subtract to the points of any person competing for such a promotion based upon that person's race, ethnic or cultural heritage.

DENNIS FITZPATRICK

Sworn to before me this
2nd day of October, 1979,
GUNTER DULLY,
Notary Public, State of New York,
Qualified in Albany County,
Commission Expires March 20, 1981
No. 4587990.

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STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

VINCENT DiGIORGIO, being duly sworn, deposes and says:

1. I am employed as a correction officer at the Downstate Correctional Facility and have been a correction officer since May 1, 1972. I make this affidavit on behalf of myself and others similarly situated for use in pending Federal court action regarding the use of the promotional exam for promotion to the rank of Correctional Sergeant, by the Department of Correctional Services.

2. During the month of October, 1978, I took the written objective examination for the position of Correction Sergeant. I have not been advised of my score on that examination.

3. I have been advised that a suit has been instituted in Federal Court contesting the validity of that examination, alleging that the examination and promotional system used by the Department of Corrections are discriminatory.

4. Subsequent to my taking the written examination I was advised that a performance evaluation rating was to be used in conjunction with that test in determining eligibility for promotion to the position of Sergeant.

5. On or about August 19, 1979, I received a notice containing a performance evaluation rating, which purported to evaluate my on-the-job performance as a correction officer. Said notice advised me that I could object to the rating, in writing, within ten (10) days.

APPENDIX K

6. On or about August 30, 1979, I filed a written objection to the performance evaluation rating given to me. I have since obtained letters from my immediate supervisors describing my job performance and have forwarded them to the administration to be considered with my objections to this rating.

7. At no time was I advised who evaluated my performance. It is my understanding that the performance ratings given to me were based in part on evaluations and reports done by persons who were not my immediate supervisors and who are unfamiliar with my actual duties and job performance.

8. I believe the performance evaluation rating system was improper and unfair in that it did not account for the

differences in the various jobs performed by correction officers at various facilities. For example, I know that a number of correction officers have no contact with inmates or civilians due to the nature of their duties, yet such officers were to be evaluated on their performance and interaction with civilians and inmates.

9. I do not believe that the performance evaluation rating system properly considered my work record or the actual performance of duties which were assigned to me.

10. I believe that correction officers who work in "contact" and "non-contact" positions were supposedly rated based upon the same criteria. It is my belief that the rating system did not

properly account for said differences in the various types of jobs and assignments which correction officers performed.

11. I have been advised that the Department of Correctional Services intends to adjust scores on the written examination which I took in October of 1978 based upon the race and/or cultural or ethnic heritage of candidates for promotion.

12. I was advised that the written test was intended to objectively measure abilities to perform the job of Correction Sergeant. I do not believe the written objective test was in any way discriminatory. I have not, as yet, been advised of my score on the written examination.

APPENDIX K

13. If the test taken for promotion to the rank of Sergeant was intended to objectively measure candidates abilities, as I believe it was, I believe it would be unfair, illegal and unconstitutional to add or subtract points from the test scores of any group of individuals based upon race or ethnic or cultural heritage.

14. It is my understanding that the law requires objective tests to measure ability, merit and fitness for promotion as far as possible. I do not believe that merit, fitness or ability is in any way determined by race, ethnic, or cultural heritage. Thus, I believe it would be wholly unfair to give any group of persons, regardless of race, creed or color, an advantage or disadvantage on such an objective test by adjusting

scores to in any way reflect a candidate's race, creed or color.

15. I believe that it is my right to be considered for promotion based strictly on objective criteria, unrelated to my race, creed or color. I further assert that the performance evaluation rating system was wholly inadequate to evaluate my job performance and ability to perform the duties of a correction sergeant.

16. If the written examination taken in October, 1978, was, and did in fact, measure merit, fitness and ability, I believe that eligibility for promotion should be based strictly on the candidate's performances on the test and should not be affected by a candidates race, creed or color and should not be in any way

affected by the improper and inadequate job performance evaluation rating system used by the Department of Corrections.

VINCENT DiGIORGIO

Sworn to before me this
2nd day of October, 1979,
ANN L. STANTON,
Notary Public, State of New York,
Qualified Dutchess Co. #4663916
Commission Expires March 30, 1980.

APPENDIX K

STATE OF NEW YORK)
) ss.:
COUNTY OF GREENE)

ROBERT VERCILE ROSE, being duly sworn, deposes and says that:

1. I am a correction officer employed at the Coxsackie Correctional Facility by the Department of Correctional Services and have been a correction officer for approximately eighteen (18) years. During the month of October, 1978 I took a written examination for promotion to the position of corrections sergeant. I make this affidavit for use in the pending Federal Court proceeding which I understand alleges that departmental policy regarding promotions and specifically the test of October, 1978, for sergeant positions discriminates

against various persons or groups of persons.

2. In October, 1978 I took a competitive written promotional exam to determine eligibility for my promotion to the position of correction sergeant. I have received no notice of my score on that examination.

3. After taking the written examination I was advised that I would be subjected to an "on the job" performance evaluation rating.

4. In late 1978 or early 1979 I received my first performance evaluation rating. Upon receiving that evaluation I filed a written objection requesting review of the evaluation rating I was given. Following that objection I was

advised that my overall performance evaluation had been raised one point.

5. I subsequently received a performance rating, rating me in four (4) different areas, together with a notice advising me that I could object in writing within ten (10) days of the rating. This evaluation rating was received in late July and I filed a written objection on or about August 1, 1979.

6. I objected to the manner in which the evaluation was done and the criteria used for evaluations in the four (4) listed areas of job performance.

My objections to the performance evaluation rating included the following:

a) I was not advised who was evaluating my performance or what criteria were being used to judge my performance;

b) I believe that my job performance rating could have been made by correction officers with less seniority than I had;

c) I believe that the raters could have been temporary sergeants who were correction officers competing with me for permanent promotion to the position of sergeant;

d) I believe I may have been unfairly evaluated by new sergeants who have been recently assigned to my facility, who were unfamiliar with my job duties and past performance;

e) I do not believe that job performance rating properly reflects my seniority, my various job duties within the correction facility, and the differences between the various job duties and

assignments performed by myself and other correction officers.

7. I have been advised that certain persons or groups of persons who are competing for permanent positions as correction sergeants have commenced an action seeking to have the test scores on the written competitive examination adjusted to account for differences in scores achieved by members of different races, colors, creeds or origins.

8. It is my understanding that the written objective test was meant to test fitness and ability for promotion to the position of correction sergeant. If the test in fact objectively measured ability and fitness of potential candidates for promotion, I believe it would be unfair, illegal and unconstitutional to adjust

the scores of any persons or groups of persons taking the test and competing for promotion to the position of correction sergeant, in any way to reflect a candidate's race, color, creed or origin.

9. If the written examination was intended to and did in fact measure ability and fitness to perform a sergeant's duties I believe I would be unfairly prejudiced and discriminated against if any person or groups of persons had points added or subtracted to or from their scores based upon race, color, creed or origin. If the test I took objectively measures ability and fitness I believe I am entitled to be considered for promotion with all other candidates for promotion who have taken the examin-

ation based upon the actual score received on the written examination.

10. I have not been notified of my score on the written examination nor have I been notified of the criteria being used in scoring the examination. Therefore, I cannot state what negative effect the proposed adjustments will have on my eligibility for promotion unless I am advised how the examination will be scored and what use will be made of those scores.

11. If the results of the examination are to be used to determine eligibility for promotions to the position of correction sergeant I believe I am entitled to be evaluated on my test scores in comparison with the test scores of

all other candidates irregardless of those candidates' race, color, creed or origin.

ROBERT VERCILE ROSE

Sworn to before me this
2nd day of October, 1979,
RALPH E. VAN HOESEN,
Notary Public, Greene Co., N.Y.
Commission Expires 3-30-80.

APPENDIX K

STATE OF NEW YORK)
) ss.:
COUNTY OF GREENE)

RAYMOND E. FRISS, being duly sworn, deposes and says that:

1. I am a correction officer employed by the Department of Correctional Services at the Coxsackie Correctional Facility. I have been a correction officer for approximately nine (9) years. During the month of October, 1978 I took a promotional examination for the position of correction sergeant. I make this affidavit for use in a pending federal court proceeding which I understand has been commenced and alleges that the objective examination taken was discriminatory and that promotions within the Department of Correctional Services are also discriminatory.

APPENDIX K

2. I have not received notice of my score on the written objective examination. It is my understanding that the use to be made of the examination I took in October of 1978 is subject to federal court orders.

3. On or about July 27, 1979 I received a performance evaluation rating, which purportedly evaluated my "on the job" performance and ability for use in determining my eligibility for promotion to the rank of correction sergeant.

4. Enclosed with my performance evaluation rating was a notice advising me that I could object, in writing, to the performance rating I was given.

5. On or about August 1, 1979 I filed an objection in writing dealing with the performance area regarding the

establishment of effective relations with program staff, civilian and visitors.

6. I have received no response to my written objection. I have been advised that some discussions regarding the review of my performance rating and the ratings of other officers at Coxsackie Correctional Facility have been had by the superintendent of the facility. However, I have not been advised what, if anything, will be done in response to my objections.

7. The Department of Corrections has refused to identify the officers who evaluated my performance in determining the performance rating I was given. Although I have objected to that performance rating, and the manner in which it

was made I have not been advised who made that rating, on what basis the rating was established and the specific criteria which were applied to my job performance in arriving at that rating.

8. I have been unable to determine whether the persons evaluating my job performance were supervisors who were in fact familiar with my job performance and the duties which have been assigned to me. I have further been advised that the use of such performance ratings in determining eligibility for my promotion to sergeant will be subject to federal court order and review.

9. I have been advised that the Department of Correctional Services intends to modify the test scores of persons taking the October, 1978 sergeants'

examination by adding or subtracting points to the scores of a number of persons who took the written objective examination.

10. When I took the examination in October, 1978 I was informed that the examination was intended to objectively test merit and fitness for promotion to the position of correction sergeant. If that is true and the examination did in fact test for merit and fitness I believe it would be illegal and unconstitutional to add or subtract points to or from the scores of any persons or groups of persons based upon race or cultural or ethnic heritage.

11. If any person or groups of persons has adjustments made to test scores based upon race, creed, color or

sex, I believe it would have the effect of discriminating against me and inhibiting my chances of promotion to the rank of sergeant.

12. It is my belief that all promotions to the position of sergeant must be based upon fitness, merit and ability which have little if anything to do with a candidate's race, creed, religion or sex.

13. If the written examination I took for promotion to the position of correction sergeant objectively tests ability to perform the duties required of a correction sergeant I believe I am entitled to be considered for a promotion along with every other candidate for such positions irregardless of race,

creed, color or sex based solely on my performance on that written examination.

14. Although I have filed a written objection to the performance evaluation rating I have received I have not been given the opportunity to be heard on my objections to the process by which I was evaluated and I cannot do so at this time as I do not know who evaluated me or what specific criteria those evaluators relied upon in giving me the rating I received.

15. I have not been advised by the Department of Correctional Services what, if any, adjustments the Department intends to make to the scores obtained on the written examination. I have not been advised what score I received on the examination and I haven't been

advised what adjustments, if any, will be made to the scores of any candidates taking that examination.

16. I believe it would be unfair, illegal and unconstitutional to make any adjustments to test scores which in any way reflect upon a candidate's race, creed, color or religion.

RAYMOND E. FRISS

Sworn to before me this
2nd day of October, 1979,
RALPH E. VAN HOESEN,
Notary Public, Greene Co., N.Y.
Commission Expires 3-30-80.

APPENDIX K

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

APPENDIX K

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON and JOHN PANELLA,

Intervenors-Defendants.

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

RONALD VAN DEUSEN, being duly sworn, deposes and says that:

1. Deponent has been employed for 20 years as a Correction Lieutenant by the New York Department of Correctional Services (D.C.S.). Deponent has been employed by D.C.S. for a total of years.

2. Deponent is currently employed in the Coxsackie Correctional Facility of D.C.S.

3. Deponent participated in the evaluation of the Correctional Officers at the Coxsackie Facility who were applicants in the 1978 Correction Sergeant Civil Service examination, and personally evaluated fourteen or fifteen applicants.

4. One eight-hour shift was alotted for the task of evaluating all of the applicants.

5. Evaluations of applicants were not performed by the same team of supervisors in all cases, so in cases where Deponent's ratings of applicants varied by five or more points from those of the other evaluator, Deponent conferred with different supervisors in arriving at a final score. In about six cases, an adjustment of the scores of the two evalu-

ators was necessary. In some cases, after conferring with whatever supervisor had also evaluated the applicant in question, Deponent revised his score to conform with that of the other evaluator. In some cases, Deponent refused to change his score.

6. Deponent and the other supervisors were instructed by an official of the Department of Civil Service and two personnel officers of D.C.S. as to how to make the evaluations. Deponent was instructed to make a rating based on the guidelines set forth in the Manual for Evaluations distributed to the evaluators.

7. xxxxxxxxxxxxxxxxxxxxxxxxxx RSV

8. Deponent found many of the examples of conduct set forth in the Manual

to be vague or to require subjective judgments. In the final analysis, evaluations had to be based primarily on the evaluator's overall impressions of the applicant and his or her performance.

9. Deponent is familiar with the various jobs performed by Correction Officers at the Coxsackie Facility based upon his experience in working as a Lieutenant in the Coxsackie facility. Deponent believes that the majority of the descriptions in the Manual for the evaluators are inapplicable to or irrelevant to some of the Correction Officers at Coxsackie who were among the applicants evaluated by Deponent and the other supervisors. Most of the situations described in the Manual apply to Correction

APPENDIX K

Officers who work within facilities on shifts where there is direct and frequent contact with inmates.

10. Most of the sample situations set forth in the Manual would not be applicable for example, to Correction Officers at Coxsackie who work the 11 p.m.-7 a.m. shift. Since the inmates are all asleep or locked in their cells during that shift, Correction Officers on that shift would seldom be required to handle or investigate inmate disturbances. Yet many of the rating criteria deal with how well a Correction Officer deals with and writes up reports on, actual or potential inmate disturbances. Similarly, an officer on the 11 p.m.-7 a.m. shift would not deal with visitors nor with inmate programs, since neither visits

nor programs are in progress during that shift. Nevertheless, the rating criteria include a Correction Officer's ability to deal with visitors and those involved with inmate programs.

11. The evaluation criteria in the Manual are generally inapplicable to Correction Officers at Coxsackie who are assigned to supervise inmates working on the prison farm. They would not be forced to deal with the "inside" situations upon which the evaluation Manual focuses. Also, several Correction Officers at Coxsackie are assigned to a mounted post, and patrol the facility grounds on horseback. Most of evaluation criteria would not apply to Correction Officers on those posts who were applicants for Correction Sergeant.

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12. Deponent believes that the evaluation criteria were, as to all applicants, very broad, and required highly subjective evaluations, although Deponent attempted to rate all applicants on the basis of the Manual.

RONALD VAN DEUSEN

Sworn to before me this
28 day of NOV, 1978.

NOTARY PUBLIC

APPENDIX K

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

APPENDIX K

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON and JOHN PANELLA,

Intervenors-Defendants.

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF CAYUGA)

PAUL MURPHY, being duly sworn, deposes and says that:

1. Deponent has been employed as a Correction Sergeant for five years. He makes this Affidavit in support of the motion of Intervenors-Defendants Dennis Fitzpatrick, Frank McDonnell, Bruce Farrell, Val Kriele, Thomas Farron, and John Panella for injunctive relief.

2. In the summer of 1978, Deponent was made a provisional correction Lieutenant, and transferred to the Depart-

ment of Correctional Services (D.C.S.) facility at Arthurkill.

3. Upon information and belief, Arthurkill was formerly a facility of the Office of Drug Abuse Services which was taken over by D.C.S. At the time of the takeover, ODAS personnel were made Correction Officers and became D.C.S. employees. All former ODAS employees have a permanent rank of Correction Officer. Some, however, were made either provisional Correction Sergeants or Lieutenants with the provision that they pass the next competitive examination for the rank in which they held the provisional appointments.

4. Upon information and belief, a provisional Correction Lieutenant employed at Arthurkill named Kushner in

September of 1978 participated in the evaluation procedures which were part of the examination for Correction Sergeant. Lt. Kushner thus evaluated Correction Officer applicants while he held the permanent rank of Correction Officer.

5. Deponent is informed and believes that Lt. Kushner's evaluation of applicants violated the Rules and Regulations of the New York Department of Civil Service. Lt. Kushner, as a permanent Correction Officer had an interest in the identity and number of persons promoted to permanent Sergeant, as those persons would thereby hold a higher permanent rank than Lt. Kushner.

6. Upon information and belief, while Deponent believes that Lt. Kushner

did not take the exam for Sergeant, nevertheless, in order to become a permanent Lieutenant, he will have to take the next Lieutenant's examination. Some or all of the persons made Sergeants by the current Sergeant's exam will be eligible to compete with Lt. Kushner for the position of permanent Lieutenant. Lt. Kushner would thus have an interest in who entered the pool of Sergeants.

7. Deponent stated to Deputy Superintendent DeLuca, that he believed that it was improper for Lt. Kushner to evaluate applicants. Deputy Superintendent DeLuca replied in words or substance that he had discussed Kushner's role as an evaluator with officials of the Department of Civil Service and that those

officials had seen no impropriety in Lt. Kushner's role as evaluator.

8. Deponent did not engage in the evaluation of candidates for Sergeant.

PAUL MURPHY

Sworn to before me this
6 day of December, 1978,
DOROTHY J. BURNS,
Notary Public, State of New York,
No. 1482,
Qualified in Cayuga County,
Commission Expires March 30, 1980.

APPENDIX K

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

APPENDIX K

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON and JOHN PANELLA,

Intervenors-Defendants.

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF SARATOGA)

JOHN CASEY, being duly sworn, deposes and says:

1. Deponent is employed by the New York Department of Correctional Services (C.D.S.) as a Correction Sergeant in the Mt. McGregor Facility of D.C.S.

2. Deponent has held the permanent rank of Correction Sergeant since 1973.

3. Deponent engaged during September, 1978 in the evaluation of applicants for the position of Correction

Sergeant pursuant to the procedures communicated to him by his superiors in D.C.S.

4. Deponent, together with another Correction Sergeant evaluated between 13 to 15 applicants using the Manual for Evaluations and instructional materials on evaluation distributed to Deponent by his superiors in D.C.S.

5. Deponent and the other Sergeant were given only one eight-hour shift to evaluate the 13 to 15 applicants assigned to them for evaluation. To the best of Deponent's recollection, the evaluations were performed the day before the Sergeants examination was given.

6. Deponent and the other member of the rating panel were not given or allowed access to the personnel files

or records of any of the applicants whom they evaluated.

7. While deponent had supervised all of the correction officers assigned to him, he was unable in some cases to remember specific details concerning the various applicants in the absence of access to their personnel files. Such details would concern such matters as formal commendations of, or discipline or written counselling of, the applicants.

8. Under the rules for making the evaluations, deponent had to compromise with his fellow evaluator in cases where the two ratings differed by more than five points.

9. As to one applicant, the other evaluator stated to deponent, in words or substance, that he had supervised the

applicant under discussion when they were both assigned to the Comstock Facility, and that he (the evaluator) had experienced trouble with the applicant at Comstock. The other evaluator rated that particular applicant much lower than did deponent, based on his personal bad experience with the applicant.

10. Deponent believes that while the evaluators attempted to rate the applicants fairly, it was impossible to eliminate the effects of personal biases and prejudices against some of the applicants.

11. Deponent believes, based on conversations with his fellow Correction Sergeants, that in some facilities, the evaluators gave unrealistically high ratings to applicants under their super-

vision so that their facility would have a high percentage of its applicants appointed as Sergeant. Deponent, however, did not, to the best of his ability, discriminate either in favor or against applicants under his personal supervision.

12. Deponent found many of the sample ratings and corresponding numerical scores set forth in the Manual for Evaluation to be vague and unclear, and to require guess work as to what score should be awarded to a particular applicant in each "dimension" of the evaluation. Moreover, the limited examinations given did not, in some cases, directly apply to particular strengths and weaknesses of individual applicants.

APPENDIX K

13. Deponent believes that the relatively short time alotted for the completion of the evaluations did not permit a detailed consideration of all of the sample evaluations, and ratings as to each applicant. Not only did the often vague standards have to be read and applied, but discussion was required with the other evaluator in cases where their evaluation scores did not match within five points.

14. Thus, deponent was forced to make generally subjective evaluations based upon his own overall impressions of the candidates. Deponent believes that most or all of the other evaluators were placed in a similar situation.

15. Deponent was informed by an examiner (who, deponent believes, was a

D.C.S. central office employee) assigned to supervise the evaluations, that in cases where the two evaluators could not agree on a numerical rating, the applicant would automatically receive a score of forty.

16. Deponent is a permanent Sergeant, and no examination for Correction Lieutenant has been scheduled, to the best of deponent's knowledge or belief. Thus, while deponent did not directly compete with the applicants for Sergeant, those appointed as permanent Sergeants will inevitably become competitors with deponent for Correction Lieutenant positions, when an examination is given for that position. Thus, while deponent attempted to fairly rate the applicants, he viewed the applicants as

potential competitors for promotion to the relatively few available positions of Correction Lieutenant.

17. Deponent had no prior experience in rating the performance of Correction Officers for Civil Service promotion purposes, and the type of evaluation required for the Sergeants examination was far different from the periodic performance ratings on Officers prepared by deponent and his fellow Sergeants.

JOHN CASEY

Sworn to before me this
25th day of November, 1968.

NOTARY PUBLIC

APPENDIX K

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

APPENDIX K

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON and JOHN PANELLA,

Intervenors-Defendants.

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF GREENE)

RAYMOND CORNELISON, being duly sworn, deposes and says that:

1. Deponent is a Correction Sergeant and has been employed in the Coxsackie Facility of the Department of Correctional Services (D.C.S.) for approximately twenty years.

2. Deponent evaluated about 14 applicants for the position of Correction Sergeant in connection with the 1978 Civil Service examination for Correction Sergeant.

3. Upon information and belief, most of the Sergeants and Lieutenants employed at Coxsackie evaluated applicants for Correction Sergeant. However, some supervisors graded only a few applicants, whereas other supervisors evaluated more than 30.

4. The supervisors did not act as teams in making the evaluations. Deponent was given a list of Correction Officers to evaluate. Other supervisors were given different lists of officers to evaluate. In cases of differences of more than 5 points in the grades given by Deponent and the other supervisor rating the applicant in question, conferences were required to resolve the differences. Deponent, owing to the variations in the lists of persons to

be evaluated, had conferences with several different fellow supervisors in the course of resolving differences in the scores awarded.

5. Deponent believes that the evaluation procedures used did not permit uniform evaluations of the various candidates. One factor leading to unequal evaluations was, in Deponent's opinion, the differences in experience at Coxsackie among the various supervisors making the evaluations. For example, Deponent, owing to his twenty years of experience at Coxsackie, is familiar with the procedures and personnel at Coxsackie. What constitutes proper procedure in various situations differs between the various D.C.S. facilities. However, Deponent believes that other supervisors

rating applicants at Coxsackie had much more limited experience working under Coxsackie procedures and working with the applicants to be evaluated. Deponent believes that a Sergeant Dugan evaluated Coxsackie applicants, although he had been at Coxsackie only about 4 months. A Sergeant Ryan who evaluated had transferred to Coxsackie from the Clinton Facility in about January of 1978. A Sergeant Van Orten, who evaluated also had limited experience at Coxsackie. Deponent believes that other evaluators likewise had limited experience working with the Correction Officers whom they evaluated.

6. Deponent and the other evaluators were not given access to the personnel records of the applicants being

rated. Thus, the evaluators had to base their ratings solely on their personal knowledge of, and opinions of, the officers being rated. Thus, supervisors who had limited experience working with Coxsackie personnel would not be able to evaluate applicants with the accuracy of veteran Coxsackie supervisors with a greater personal knowledge of the abilities of Coxsackie personnel.

7. Deponent further believes that a supervisor who has worked at Coxsackie for only one year, for example, could accurately rate officers whom he supervised only on what happened in that one year, unless the evaluator relied on hearsay, rumor, or guesswork. Conversely, Deponent, who may have supervised an applicant for ten or more years,

would be evaluating the officer based on the latter's performance for the whole ten year period. Thus, the ratings would of necessity differ, owing to the different body of facts under consideration.

8. Deponent believes that the procedures used encouraged subjective decisions, and did not prevent the exercise of personal biases and prejudices concerning the applicants. The standards for rating set forth in the Manual were vague and ambiguous, and the absence of personnel records deprived evaluators of any chance to refer to the objective history of applicants. Moreover, many applicants socialized with the supervisors who rated them when off duty, thus creating a whole network of personal friendships or hostilities which either con-

sciously or unconsciously influenced the ratings given. Also, many Correction Officers are related to higher ranking supervisors by blood or marriage, causing special consideration to be given in some cases.

9. Deponent attempted in all cases to be fair and objective. However, Deponent believes that the rating standards set forth in the Manual were, in many cases, so vague, general, or subjective as to cause Deponent to rely on his overall, subjective opinion concerning the applicant being rated.

10. Deponent believes, based on his personal knowledge of the various jobs performed by Correction Officers at Coxsackie, that the examples given in the Manual did not permit the accurate

evaluation of Correction Officers who did not deal directly with inmates in conflict situations within the facility. For example, some Correction Officers at Coxsackie work on the facility's farm, where the problems encountered are much different than those in the facility's housing areas. Other Correction Officers supervise inmates in the kitchen only, where the problems are again different. Other Correction Officers only check packages for contraband or censor letters. Others work the night shift when the inmates are asleep and unlikely to be involved in violent incidents. Many Correction Officers have held such specialized jobs for ten or more years. They cannot be accurately evaluated under most of the criteria set forth in the Manual

which relates mainly to officers assigned to posts within facilities where incidents of violence are apt to occur. Also, most of the specialized positions involve no contact with visitors, volunteers, or "civilians," while one of the areas of evaluation set forth in the Manual is an officer's ability to work with "civilians."

11. Deponent believes that some of the most experienced supervisors at Coxsackie were assigned to evaluate only a small number of applicants, whereas less experienced supervisors were assigned to evaluate many applicants.

12. Deponent believes that while the evaluators at Coxsackie attempted to be as fair as possible when evaluating, the supervisors at some institutions tend

to rate their own applicants very highly, so that "their" applicants do relatively better than applicants from other facilities.

13. Deponent believes that for all of the reasons set forth above, the evaluations were arbitrary, subjective and unequal.

RAYMOND CORNELISON

Sworn to before me this
28th day of November, 1978,

JO DiBELLO,
NOTARY PUBLIC.

APPENDIX K

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

APPENDIX K

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON and JOHN PANELLA,

Intervenors-Defendants.

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF GREENE)

DUANE OVERBAUGH, being duly sworn, deposes and says that:

1. Deponent is presently employed by the New York Department of Correctional Services as a provisional Lieutenant and is assigned to the Coxsackie Facility.

2. Deponent was a Correction Sergeant at Coxsackie from approximately September, 1976 to September, 1977. In September of 1977, Deponent was made a

provisional Lieutenant and Deponent transferred to and worked exclusively at the Fishkill Facility from approximately September 1977 to May of 1978.

3. In May of 1978, Deponent returned to the Coxsackie Facility as a Correction Lieutenant (provisional).

4. Deponent was assigned as a part of the 1978 Correction Sergeant exam to evaluate one Coxsackie Correction Officer who was an applicant for promotion to Correction Sergeant.

5. While the Correction Officer to be evaluated was under the supervision of Deponent on the 11 p.m.-7 a.m. shift, Deponent had as of the evaluation, only technically supervised the Officer for about five months, owing to Deponent's prior assignment to Fishkill. In fact,

Deponent had not actually supervised the applicant at all, as the Officer was on sick leave for most or all of the period between Deponent's return to Coxsackie and the date of the evaluations.

6. Deponent thus believed that he had insufficient information to accurately evaluate the applicant. The applicant had worked at Coxsackie during the period when Deponent worked as a Sergeant at Coxsackie, but the applicant was then on a different shift, and Deponent never supervised him.

7. An employee of the Department of Civil Service (whose name Deponent does not recall) distributed the evaluation materials and generally supervised the performing of the evaluations.

APPENDIX K

8. The Civil Service employee asked before the evaluations were made if any of the supervisors had any objections to the assignment of applicants for evaluation. Deponent stated in words or substance that Deponent was not sufficiently familiar with the Officer assigned to him for evaluation to accurately rate the applicant. There was some snickering, and the Civil Service employee was silent. Deponent interpreted the silence as a refusal to relieve Deponent of the task of rating the applicant. Deponent thus evaluated the applicant assigned to him so as not to be held derelict in performing his duties.

9. Deponent was not supplied with or given access to the personnel file or

records concerning the Officer whom Deponent evaluated.

10. Deponent made an effort to rate the applicant based on Deponent's limited information concerning the latter's abilities. The difficulty was made greater by the general, subjective and imprecise nature of the evaluation examples set forth in the Manual for Evaluations. Moreover, officers on the 11 p.m.-7 a.m. shift have limited contact with inmates (who are asleep) and with visitors. Thus, many of the examples in the Manual were not applicable to the applicant in question. Deponent was forced to make an evaluation that was largely subjective.

11. Deponent and the other supervisor rating the applicant in question

differed by more than 5 points. Thus, a conference was required. To the best of Deponent's recollection, he raised his rating 5 points and the other evaluator dropped his rating 5 points.

12. Deponent is a provisional Lieutenant. Deponent believes that if permanent Sergeants are created as a result of the 1978 exam, some or all of the newly created Sergeants will be able to compete with Deponent on the next test for Lieutenant, as Deponent is still a permanent Sergeant.

DUANE OVERBAUGH

Sworn to before me this
30th day of November, 1978.

NOTARY PUBLIC

APPENDIX K

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBIERO and HENRY L. COONS,

Intervenors-Defendants,

-and-

APPENDIX K

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, VAL KRIELE, THOMAS FARRON, VINCENT DIGIORGIO, ROBERT VERCILE ROSE, and RAYMOND E. FRISS, BRUCE MESERVEY,

Intervenors-Defendants.

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JENNIFER DLNNIS, being duly sworn, deposes and says that she is over the age of 18 years and not a party to the within action; that on the 3rd day of October, 1979, at or about 5:00 p.m. she served the Intervenors' summons, complaint and memorandum of law on behalf of intervenors in the within action, upon the following:

APPENDIX K

NAACP Legal Defense and Education
Fund, Inc.
10 Columbus Circle
New York, New York 10019
Attention: Judith Reed, Esq.

State of New York
Department of Law
Two World Trade Center
New York, New York 10047
Attention: Judith Gordon, Esq.
Assistant Attorney General

by personally delivering a true and correct copy of the same enclosed in a postpaid wrapper to the U.S. Post Office located on Broadway, Albany, New York, to be sent by the U.S. Post Office by Express Mail, directed to said attorneys, respectively, at said addresses, respectively mentioned above, that being the addresses within the state designated for that purpose upon the last papers served in this action or the place

where the above then resided or kept offices, according to the best information which can be conveniently obtained.

JENNIFER DENNIS

Sworn to before me this
3rd day of October, 1979,
JEAN E. SCHULTZ,
Notary Public, State of New York,
Qualified in Schenectady County,
Commission Expires March 30, 1981
No. 4660481.

APPENDIX L--AFFIDAVIT OF KENNETH L. SIEGAL, SEPTEMBER 26, 1979.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- X

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

-and-

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Defendants.

- X

APPENDIX L

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I, KENNETH L. SIEGAL, being duly sworn, deposes and says:

I am a Principal Personnel Examiner for the New York State Department of Civil Service with a Master's Degree in Educational Psychology and Statistics. I was responsible in large part for the design and development of the Correction Sergeant Selection System, including job analysis and criteria development and analysis. I have also analyzed the results of the procedure and assisted in the preparation of the report describing the criterion validity of the examination.

As described in the report "Correction Sergeant Selection System: Validity

and Ethnic Effect" with Appendices 1 through 3, the Correction Sergeant selection measures are criterion valid in that significant correlations exist between the selection composite scores (weighted sum of performance dimension ratings and written test) and composite criteria. This report, however, does not directly address the question of differential validity or fairness.

The concept of differential validity or fairness is incorporated in both the 1972 and 1978 Uniform Guidelines on Employee Selection Procedures. The 1978 Guidelines state that when members of a group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in

differences in a measure of job performance, the use of the selection procedure may unfairly deny opportunities to members of the group that obtains lower scores.

The question of fairness arises, therefore, in criterion validation studies where both selection and job performance scores are available.

To investigate the fairness of the Correction Sergeant selection procedure, comparisons were made between the criterion scores and composite predictor scores for whites as against blacks and hispanics. For each of the two groups, for both Sergeants and Correction Officers, the average composite predictor score (test) at each of several levels of job performance (*i.e.*, criterion

score) was calculated. The attached table (Exhibit A) displays these results. At each level of job performance, the black and hispanics generally do not score as well as the whites. (*E.g.*, for UROT v. 21214 for those subjects having a composite criteria score of approximately .139, the whites have an average predictor composite score of 7923, while the black and hispanics have an average score of 7647.)

The values displayed in Table A were graphed and trend lines which best fit these points (i.e. the displayed values) were derived. The trend lines are displayed in the attached graph (Exhibit B). For each group the relationship between criterion score and predictor score is linear and appropriately sloped. (I.e.,

the lines show that higher criterion scores imply higher predictor scores). For comparable samples, trend lines for whites and blacks and hispanics have very similar slopes but differ substantially in intercept, or elevation. For example, for the UROT vs 21214 comparison, the slopes for whites and blacks and hispanics are 86.7 and 86.0. The intercepts are 7909 and 7588.

These results show that blacks and hispanics characteristically perform less well on the predictors, but that this difference is not reflected in differences in job performance. Since predictor performance (test score) determines likelihood of appointment, whites with a particular level of job performance would be selected at a higher rate

than blacks and hispanics with the same measured job performance.

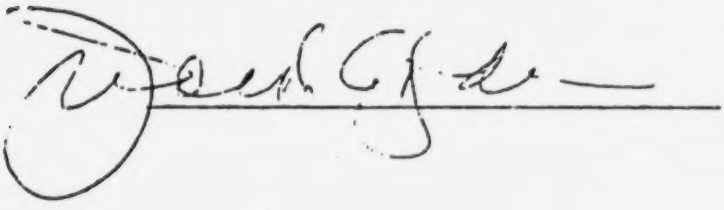
The composite scores can be adjusted so that the likelihood of appointment is approximately the same for both groups at each level of job performance. An adjustment (addition) of 250 points (out of a maximum 8830) to black and hispanic composite predictor scores would make the two trend lines nearly coincident. The 250 point adjustment is derived from the observed differences between trend lines for the two groups subject to the limits of accuracy imposed by the sample size.

This adjustment conforms with the concept of fairness described in the guidelines, and with Civil Service rules. Table 5A (Exhibit C) displays the comp-

osite predictor scores for candidates after the adjustment has been applied to black and hispanic scores.

KENNETH L. SIEGAL

Sworn to before me this
26th day of September, 1979.



COMPARISON OF COMPOSITE PREDICTOR SCORES WITHIN CRITERION INTERVALS (ACROSS ETHNIC)

Lower Limit Composite Criteria	UROT vs 21214				76SGCMP vs 2-21214				76SGCMP vs C212147			
	W		M		W		M					
	N	$\bar{x}_p$	N	$\bar{x}_p$	N	$\bar{x}_p$	N	$\bar{x}_p$	N	$\bar{x}_p$	N	$\bar{x}_p$
1.8+	1	8125	0	-	0	-	0	-	0	-	0	-
1.524	0	-	0	-	0	-	0	-	0	-	0	-
1.247	0	-	0	-	1	6470	2	7330	1	6695	0	-
.97	3	7985	0	-	1	7014	1	6334	0	-	0	-
.693	25	8068	3	7840	13	7745	2	7202	5	7395	0	-
.416	35	7943	4	7615	72	7760	35	7232	15	7226	9	7174
.139	59	7923	10	7647	133	7559	56	7105	30	7313	3	6595
-.138	42	7827	3	7620	132	7444	52	7625	30	7218	7	7051
-.415	15	7794	2	7785	63	7458	24	7095	12	7193	4	7245
-.692	25	7828	1	8330	24	7381	24	6998	6	7069	4	6729
-.969	7	7922	0	-	21	7386	11	7152	4	7355	2	6660
-1.246	5	7676	0	-	9	7152	11	7208	1	7135	3	6848
-1.523	6	7843	2	7420	6	7152	6	7022	0	-	0	-
-1.8	7	7830	0	-	3	7240	3	6673	1	7435	3	6882
-1.8-	5	7708	3	7205	0	-	1	7730	0	-	0	-
N	235		28		478		232		105		35	
Intercept	7909		7588		7562		7178		7263		6951	
Slope	86.7		86.0		242.6		109.77		71.44		90.35	
r	.764		.434		.941		.475		.386		.280	

NOTE: Cells with single cases were not included in calculation of trend lines

EXHIBIT B--TREND LINES-WHITE AND MINORITY
ANNEXED TO SIEGAL AFFIDAVIT.

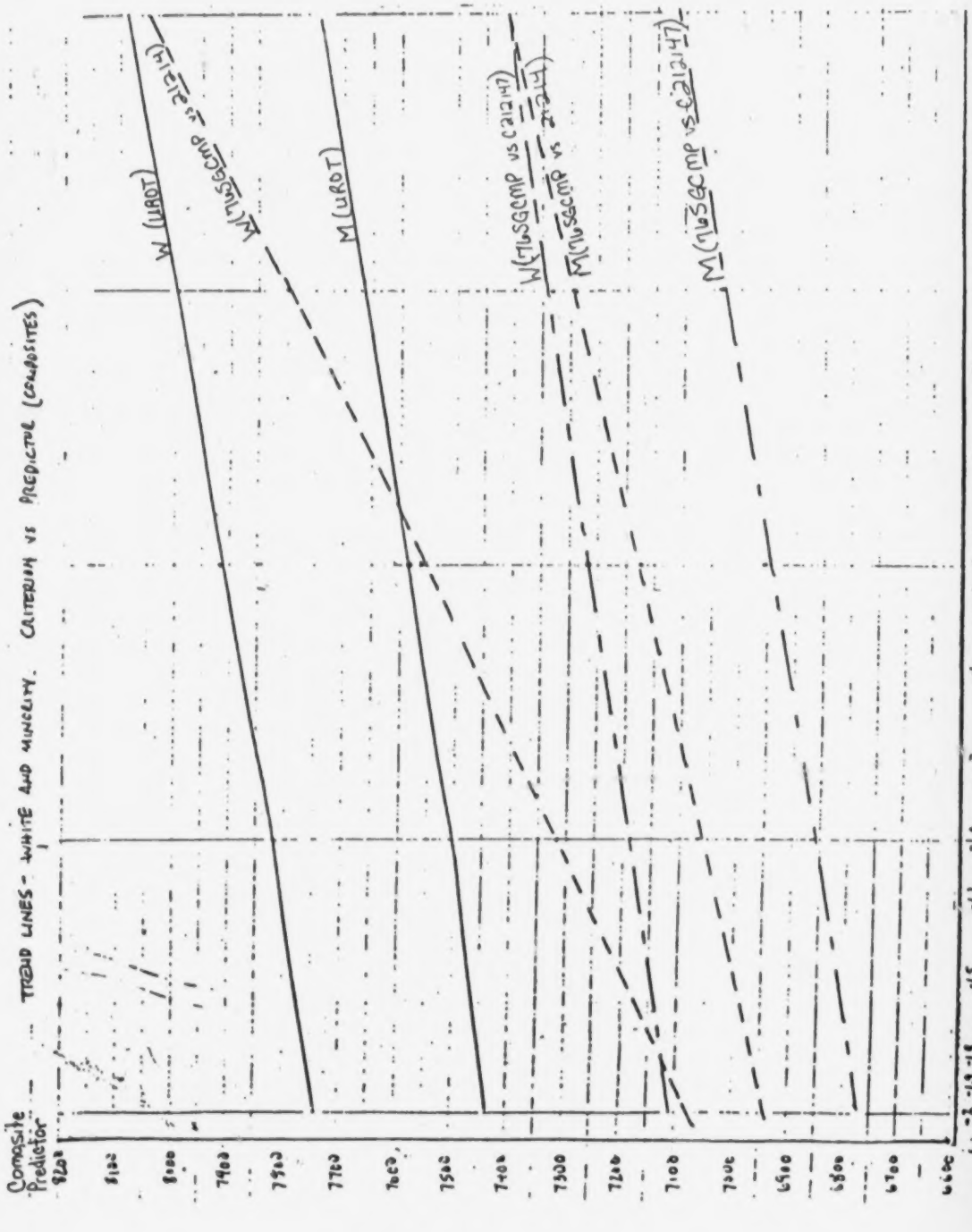


EXHIBIT C--COMPOSITE PREDICTOR BY ETHNIC GROUP ANNEXED TO SIEGAL AFFIDAVIT.

COMPOSITE PREDICTOR BY ETHNIC GROUP (WITH ADJUSTMENT)

Table 5A

SCORE LOWER LIMIT	F Black	F Hisp	F Min.	F White	Cum F Black	Cum F Hisp.	Cum F Min.	Cum F White	Cum % Black	Cum % Hisp.	Cum % Min.	Cum Whit
8425+	2	1	3	5	2	1	3	5	.004	.008	.005	.00
8325	3	2	5	12	5	3	8	17	.009	.023	.012	.01
8200	10	4	14	36	15	7	22	53	.028	.053	.033	.03
8075	18	7	25	63	33	14	47	116	.063	.107	.071	.06
7950	18	5	23	136	51	19	70	252	.097	.145	.106	.15
7825	26	6	32	160	77	25	102	412	.146	.191	.155	.24
7700	40	19	59	235	117	44	161	647	.222	.336	.244	.38
7575	50	16	66	206	167	60	227	853	.316	.458	.344	.50
7450	56	14	70	205	223	74	297	1058	.422	.565	.451	.63
7325	54	12	66	167	277	86	363	1225	.525	.656	.551	.73
7200	70	11	81	130	347	97	444	1355	.657	.740	.674	.80
7075	48	9	57	87	395	106	501	1442	.748	.809	.760	.85
6950	39	10	49	75	434	116	550	1517	.822	.885	.835	.90
6825	28	8	36	59	462	124	586	1576	.875	.947	.889	.93
6700	28	0	28	42	490	124	614	1618	.928	.947	.932	.96
6575	13	1	14	31	503	125	623	1649	.953	.954	.953	.98
6450	5	3	8	13	508	128	636	1662	.962	.977	.965	.99
6325	0	0	0	4	508	128	636	1666	.962	.977	.965	.99
6200	0	0	0	4	508	128	636	1670	.962	.977	.965	.99
6200-	20	3	23	8	528	131	659	1678	1.00	1.00	1.00	1.00

APPENDIX M--UNITED STATES CONSTITUTION.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX M

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AND

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX M

42 USC § 1981

United States Code Service, L. Ed., 42 USCS § 1981, pgs. 262-63:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. (R.S. §1977.)

42 USC § 1983

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(As amended Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

APPENDIX M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDELINES ON EMPLOYMENT SELECTION PROCEDURES.

29 CFR § 1607.14(8)(a)

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

29 CFR § 1607.14(8)(d)

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the

job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

APPENDIX M

NEW YORK STATE CONSTITUTION

ARTICLE V § 6

Appointments and promotions in the Civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points

additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an

examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

No. 80-992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS FITZPATRICK, *et al.*,

Petitioners,

v.

EDWARD L. KIRKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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No. 80-992

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DENNIS FITZPATRICK, et al.,

Petitioners,

v.

EDWARD L. KIRKLAND, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the Question Presented inaccurately reflects what they seek this Court to review. This case presents no questions concerning federal constitutional or statutory provisions. Petitioners simply disagree with the lower courts' construction of a

particular section of the Uniform Guidelines on Employee Selection Procedures, 29 CFR §16.071., et seq., as promulgated by the Equal Employment Opportunity Commission ("EEOC") in 43(166) Fed. Reg. 38290 et seq. (hereafter the Guidelines).[1/]

Petitioners themselves concede the narrowness of the issue: "it is the manner of the application of the EEOC Guidelines in the particular facts of this case as they have developed since the first Court of Appeals decision to which petitioners object." Pet. at 15 (emphasis added). Although petitioners allude to questions regarding the underlying liability issue, they themselves recognize that the liability issue was finally determined long ago by the first opinion of the Court of Appeals (520 F.2d 420), and no review of that finding was ever sought. See Pet. at 14.

The full history of this 10-year-old litigation and many of the pertinent facts are set forth

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1/ The section at issue is § 16.07.14B(8)(d). The text of this section and the related section, 14B(8)(a), is set forth in the petition. Pet. at 10, 11 and Pet. App. M-5, 6.

in the two reported opinions of the Second Circuit. See, 520 F.2d 420, 422-423; 426 (1975); 628 F.2d 796, 797-98 (1980)(Pet. App. H-7 to 11; A-3 to 9).[2/] The remainder of this section of the brief discusses the posture of the instant case.

By order of the district court, dated July 31, 1974, Examination No. 34-944 was declared unconstitutional and defendants[3/] were ordered to develop an examination validated in accordance with the Guidelines. July 31, 1974 Order, ¶¶ 1 and 3(b), 8 EPD ¶9675 at 5838 (Pet. App. F-2, F-3 to 4). The validation was to be of the type known as "criterion validity" to the extent it was feasible. July 31, 1974 Order, ¶ 3(c), 8 EPD at 5838 (Pet. App. F-4). Pursuant to that directive, defendants developed Examination No. 36-435. Defendants presented the criterion validity

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2/ Citations in this form refer to the appendix to the petition.

3/ Respondents include the New York State Department of Correctional Services and the New York State Civil Service Commission, as well as the original plaintiffs. In order to distinguish between the two sets of respondents, we refer to the respondents as plaintiffs and defendants.

study to the district court for its approval, and plaintiffs consented to the entry of an order granting the approval sought. 482 F.Supp. at 1181 (Pet. App. B-3). Petitioners filed a proposed complaint in intervention (Pet. App. K). Plaintiffs and defendants moved for summary judgment, and the district court granted that motion. 482 F.Supp. at 1181 (Pet. App. B-6).

The district court first found that no triable issues of material fact barred the motion (Pet. App. B-6 to 7). At no point in the proceedings had petitioners provided, or offered to provide, affidavits or other proof to oppose the technical aspects of the study or the opinions of plaintiffs' and defendants' experts. 482 F. Supp. at 1182 (Pet. App. B-9 to 10).[4/]

The district court then held that the proposed addition of only 250 points out of a maximum of 8830 (Pet. App. L-7), to the scores of minority candidates conformed with the Guide-

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4/ Only at this late hour do petitioners raise such issues by urging this Court to "evaluate the [defendants'] methodology" (Pet. at 11); however, even here they offer no additional facts. Cf. 628 F.2d at 797 n.1.

lines. Id. (Pet. App. B-9). It assured compatibility between the probability of successful job performance and the probability of being selected. Id., quoting Guidelines. It was not a quota in violation of the Second Circuit's prior decision (520 F.2d at 427-30), since it did not establish a fixed ratio of minority appointments without regard to test and job performance. 482 F. Supp. at 1181 (Pet. App. B-8).

The Second Circuit affirmed the district court's grant of summary judgment. 628 F.2d at 798 (Pet. App. A-6). Agreeing with the district court that petitioners had raised no triable issues of material fact, it held the 250-point adjustment was neither a quota nor forbidden reverse discrimination, but, rather, was a proper and necessary method of implementing the relief previously ordered. 628 F.2d at 799, 801 (Pet. A-9, 13). Petitioners do not question the propriety of deciding the remedy issue on a motion for summary judgment; hence, like the liability determination, the facts involved are not in dispute.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for two reasons. (1) The Court of Appeals properly affirmed the district court's exercise of discretion in implementing a remedy for a previously found consitutional violation. (2) The decision of the Court of Appeals is consistent with the decisions of other circuits and of this Court.

ARGUMENT

Reasons For Denying The Writ

I. IN UPHOLDING THE DISTRICT COURT'S APPROVAL OF EXAMINATION NO. 36-435, THE SECOND CIRCUIT PROPERLY AFFIRMED AN APPROPRIATE REMEDY FOR A SETTLED CONSTITUTIONAL VIOLATION.

In affirming the district court's decision sanctioning examination no. 36-435, the Second Circuit Court of Appeals approved an appropriate remedy, while properly acknowledging the inherent power of the district court to implement a decree remedying a constitutional violation.

The duty of a district court upon a finding of unconstitutional racial discrimination is settled by decisions of this court:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). This principle has been held to be equally applicable to cases involving the framing of remedies for illegal employment discrimination:

> Where racial discrimination is concerned, 'the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'

Albemarle Paper Company v. Moody, 422 U.S. 405, 418 (1975), quoting Louisiana v. United States, 380 U.S. 145, 154 (1965). See also, Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976), and Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

The earlier opinion of the Second Circuit upheld the finding that the examination for promotion to the position of Correction Sergeant administered in 1972 (examination no. 34-944) was discriminatory, in violation of the Constitution. 520 F.2d at 426 (Pet. App. H-10). Petitioners concede that they do not challenge this finding (Pet. at 14). The earlier opinion also approved in its entirety the remedy ordered by the district court as it related to the development of a new, validated selection procedure. Id. (Pet. App. H-11).

The district court's order merely implemented that remedy, and it provided for no more than would be necessary to effect present compliance with Title VII "and to prevent future discrimination of the kind found to have existed earlier in this case." 628 F.2d at 798 (Pet. App. A-6). Albemarle Paper Co v. Moody, supra. The appellate court's task was thus simply that of examining the implementation of the remedy, and, after considering all objections, determining that the district court had carried out its mandate and had not

abused its discretion. There is, therefore, no question for this Court to review.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Despite their recognition that all this case involves is interpretation of an administrative regulation, petitioners vainly attempt to set forth reasons for a grant of certiorari.

Petitioners argue that this Court should grant certiorari because of an asserted "expansion" of the scope of Albemarle v. Moody, supra (Pet. at 21) or a misapplication of the principles of Washington v. Davis, 426 U.S. 229 (1976) (Pet. at 26), and based on their mistaken contention that the 250-point adjustment constitutes a minority preference or quota that contravenes the holding in University of California Regents v. Bakke, 438 U.S. 265 (1978)(Pet. at 24). None of these implied conflicts exists.[5/]

5/ Petitioners do not assert any conflict among the circuits (Sup. Ct. R. 17.1(a)). Indeed, most courts of appeals have cited the

Recent decisions of this Court have endorsed the Guidelines, see Detroit Edison Company v. NLRB, 440 U.S. 301, 313 (1979), Dothard v. Rawlin-

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5/ continued

Guidelines with approval and often have endorsed the concept of differential validity. See, e.g., Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1026 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. City of Miami, 614 F.2d 1322, 1344 (5th Cir. 1980); Sims v. Sheet Metal Workers International Assn., 489 F.2d 1023, 1025 (6th Cir. 1973); United States v. City of Chicago, 549 F.2d 415, 433 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); Donnell v. General Motors Corp., 576 F.2d 1292, 1299-1300 (8th Cir. 1978); Blake v. City of Los Angeles, 595 F.2d 1367, 1379 (9th Cir. 1978), cert. denied, ___ U.S. ___, 100 S. Ct. 1865 (1980); Douglas v. Hampton, 512 F.2d 976, 986-87 (D.C. Cir. 1975). In United States v. City of Chicago, supra, the court noted ". . . the EEOC Guidelines require that an examination be validated for both minorities and whites. . . . We do not consider this requirement a mere technicality." See also, Rogers v. International Paper Co., 510 F.2d 1340, 1350 (8th Cir. 1975); Stamps v. Detroit Edison Co., 365 F.Supp. 87, 117 (E.D. Mich. 1973), modified, 515 F.2d 201 (6th Cir. 1975)(". . . it

son, 433 U.S. 321, 332 (1977) and Albemarle Paper Co. v. Moody, supra. In Albemarle, this Court expressly approved differential validation of employment tests, noting that the Guidelines were entitled to "great deference". 422 U.S. at 431, quoting from Griggs v. Duke Power Company, 401 U.S. 424, 433-34 (1971). The Court of Appeals has not expanded the concept of differential validation; it has merely affirmed the district court's interpretation of the provision in the Guidelines that covers the steps that may be taken once a differential validity study shows the existence of "unfairness".6/ Were defendants to have ignored

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5/ continued

becomes [defendant's] burden to prove that these test batteries are valid predictors of job performance for blacks as a separate group where feasible. . . ."), concept approved on appeal, 515 F.2d at 313.

6/ As the Court of Appeals noted,

> . . . once the results of . . . a [differential validity] comparison indicate a discrepancy, the responsible authorities have a choice. They can return to the drawing board and design a new test meant to correlate to job performance ratings; or they can adjust

the evidence of unfairness and used the results of the examination without modification, "whites with a particular level of job performance would be selected at a higher rate than blacks and hispanics with the same measured job performance." (Pet. App. L-6, 7). Thus, contrary to petitioners' assertions, it is only in the absence of the 250-point adjustment that a racial preference occurs, since in that case lesser qualified whites would have been selected over better qualified minorities. The action taken here by defendants is clearly within the contours of Albemarle, as five members of this Court recognized in Bakke.[7/]

6/ continued

> the test to bring the results into conformity with those ratings. See 29 C.F.R. § 1607.-14(8)(d). In this case, they chose the latter course of action, an alternative clearly foreseen by our prior opinion.

628 F.2d at 799 (Pet. App. A-8, 9).

7/ After describing an example of differential validity, in a concurring opinion Mr. Justice Brennan noted the following:

> By implication, were it determined that a test score of 50 for a minority corresponded

Nor does Washington v. Davis, supra, forbid adherence to the Guidelines in developing a non-discriminatory selection procedure, even in a non-Title VII case. That decision holds only that no one type of validation is mandated by the Constitution. 426 U.S. at 250-51. Petitioners do not contend it was error for the defendants to follow the Guidelines in developing the latest examination. Nor are they able to demonstrate any error in the District Judge's "sensible construction" of Section 14B (8)(d) of the Guidelines. Cf. 426 U.S. at 251-52.[8/]

7/ continued

> in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire non-minority applicants with scores above 50 but below 60.

Id., 438 U.S. at 364 n.37 (opinion joined by Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun). See also Id. at 306 n.43 (opinion of Mr. Justice Powell).

8/ Petitioners appear to object only to the district court's reliance on a communication with the General Counsel of the very agency that drafted the Guidelines and the lack of judicial precedent for the precise interpretation (Pet. at 12).

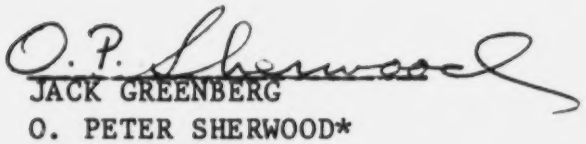
While petitioners correctly note that this Court has shown a "concern regarding racial preference." Pet. at 25, in each instance where this Court has been presented with such questions, it has approved the use of racial distinctions, as an appropriate equitable remedy. See, e.g., Bakke, supra; United Steelworkers of America v. Weber, 443 U.S. 193 (1979), Fullilove v. Klutznik, ____ U.S.____, 65 L.Ed.2d 902, 927 (1980) and Franks v. Bowman Transportation Co., supra. Here, however, as Mr. Justice Powell recognized in Bakke, the issue is not a quota or a preference for one group over another, but the perfection of a testing instrument within the limits of the current state of the art:

> To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. 438 U.S. supra, at 306 n. 43 [emphasis added].

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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January, 1981

No. 80-992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS FITZPATRICK, FRANK McDONNELL, BRUCE FARRELL, THOMAS FARRON, VINCENT DiGIORGIO, ROBERT VERCILE ROSE, RAYMOND E. FRISS, and BRUCE MESERVEY,

Petitioners,

against

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Respondents,

and

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCLESI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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No. 80-992

IN THE

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OCTOBER TERM, 1980

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, THOMAS FARRON, VINCENT DIGIORGIO, ROBERT VERCILE ROSE, RAYMOND E. FRISS, and BRUCE MESERVEY,

Petitioners,

against

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Respondents,

and

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSIONER; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCLESI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statement of the Case

The United States Court of Appeals for the Second Circuit upheld the testing and scoring methods used on examination number 36-435 for promotion to New York State Correction Sergeant because they satisfied technical standards for criterion-related validity, set forth in the Uniform Guidelines on Employee Selection Procedures ("Guidelines"), 29 C.F.R. § 1607.14B, 43 (166) Fed. Reg. 38290, 38300-38302 (§ 14.B) (Aug. 25, 1978), and state law requirements for competitive examinations, N.Y. Const. Art. V, § 6; N.Y. Civil Service Law § 50. Opinion below, App. A-3 to A-13, affirming 428 F. Supp. 1179 (S.D.N.Y. 1980), reproduced at App. B-1 to B-15.* Petitioners now seek plenary consideration of one aspect of the examination's criterion validity study, the addition of 250 points to the composite test scores of minority candidates to make the examination 'fair' under § 1607.14B(8) of the Guidelines (43 [166] Fed. Reg., *supra,* at 38301-38302, § 14.B[8]).**

A fairness inquiry is a technical incident of all criterion validity studies which include populations of sufficient size and range and the related data necessary to make the inquiry feasible. *Ibid.* Compare Petition, pp. 9, 15, describ-

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* References preceded by "App." are to the appendix to the Petition. Prior decisions and orders in this case are cited to the reports in which they appear and to the appendix when first referenced and thereafter only to the appendix.

** A candidate's composite score on examination number 36-435 is a weighted sum of his raw scores on two test measures, an on-the-job performance rating and a multiple-choice written test. Opinion below, A-4. There was no oral test or interview. Compare Petition, p. 7. It is conceded that the composite test scores so obtained are predictive of, or significantly correlate with, indepently developed criterion measures of important job elements and behaviors. Petition, pp. 9, 10 and Siegal September 26, 1979 affidavit, App. L-3. See Guidelines § 1607.14B(3),(5), 43 (166) Fed. Reg., *supra,* at 38300-38301, § 14B(3),(5).

ing the fairness provisions of the Guidelines as separate from the technical standards for criterion validity. The inquiry assesses the predictive accuracy of the test scores of race and/or sex identified candidate groups through statistical comparisons between those test scores and the scores obtained by groups with the same characteristics on independent criterion measures of job performance. An examination is unfair if "members of one race, sex or ethnic [candidate] group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance," i.e., in the designated criterion measure or measures. Guidelines § 1607.14B(8)(a) (reproduced at App. M-5). An unfair examination cannot be used unless it is made 'fair' by appropriate revisions . . . to assure compatibility between the probability of successful job performance and the probability of being selected." Guidelines § 1607.14B (8)(d) (reproduced at App. M-5 to M-6). See opinion below, A-7. Although a fairness inquiry and the statistical comparisons and revisions it entails reflect the forefront of the state of the art in employment testing, it is the accepted professional and legal standard. See 43 (166) Fed. Reg., *supra,* at 38294-38295 ¶ 7, discussing the Guidelines" fairness requirement (§ 1607.14B [8]) and noting its incorporation in the American Psychological Association Standards for Educational and Psychologicel Tests and its consistency with principles of equal employment opportunity established in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). See also *University of California Regents* v. *Bakke,* 438 U.S. 265, 306 n. 43 (opinion of POWELL, J.) (1978); *Id.* at 364 n. 3 7(opinion of BRENNAN, J.). Compare Petition, pp. 12, 17-20, 22.

The fairness inquiry for examination number 36-435 compared the composite test ("predictor") scores of whites and minorities with the criterion scores of the same race-

identified groups. Siegal affidavit, App. L-4.* The results (displayed at App. L-10) show, *inter alia*, that whites have higher predictor scores than their minority counterparts who will perform the job just as well (as demonstrated by the criterion scores). Siegal affidavit, App. L-5 to L-6. Since predictor scores determine the likelihood of appointment as a Correction Sergeant, the above results permit whites with a particular level of job performance to be selected at a higher rate than minorities with the same measured job performance (*Id.* at App. L-6 to L-7), and the examination is unfair under the Guidelines § 1607.14B (8)(a) (App. M-5). To eliminate this unfairness, the predictor scores of minority candidates were revised by adding 250 points. Siegal affidavit, App. L-7. The 250 points are the empirically observed difference between the substantially equivalent work performances of the white and minority groups and their predictor scores. *Ibid.* See opinion below, App. A-5 to A-6.

The Court of Appeals reviewed the same challenges to the fairness of examination number 36-435 presented in the Petition. The court recognized that the examination's criterion validity and its fairness were components of a single validation strategy (opinion below, App. A-8 to A-9); that the examination could not be accepted as valid without regard to its fairness (*Id.* at App. A-6); and that the 250 point differential was not a quota or 'reverse discrimination' but the means of preventing discrimination (*Id.* at A-6, A-7).

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* The composite scores were not compared with the on-the-job performance ratings which was one of the test measures. See second footnote p. 2, *ante*. Compare Petition, p. 9.

ARGUMENT

The fairness of examination number 36-435 does not warrant plenary consideration by this Court. As applied to the examination, fairness is racially neutral in purpose and effect and consistent with accepted principles requiring employment tests to be demonstrably job-related and guaranteeing all individuals equal access to public employment.

Petitioners several arguments in favor of plenary consideration misconceive the purpose and effect of the fairness inquiry for examination number 36-435. The inquiry and consequent addition of 250 points to the test scores of minority candidates confirm rather than oppose the principle that employment tests must be demonstrable measures of job performance. Compare Petition, pp. 16-17 citing *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), and *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 436 (1971). They do not read or apply the Guidelines to require "identical rates of success" (Petition, p. 18) or "equality of results" (*id.* at p. 22) across "competing racial groups." *Id.* at p. 18. Nor do they reach the limits of minority preferences previously considered by this Court under either the Equal Protection Clause or Title VII. Compare Petition, pp. 23-26. The fairness revision in the test scores authorized by § 1607.14B(8)(d) (App. M-5 to M-6) of the Guidelines and applied to examination number 36-435 is not a minority preference, quota, hiring goal or affirmative action program. It is the most precise technical means the state of the art permits for achieving equality of employment opportunity and eliminating irrelevant racial bias which would have operated in examination number 36-435, if not corrected, to favor an identifiable group of white candidates over minority candidates with an equal likelihood of job success. See *University of California*

Regents v. *Bakke,* 438 U.S. 265, 306 n. 43 (opinion of POWELL, J.) (1978); *id.* at 364 n. 37 (opinion of BRENNAN, J.); *Albemarle Paper Co.* v. *Moody, supra,* at 417; *Griggs* v. *Duke Power Co., supra,* at 429-30.

The fairness inquiry for examination number 36-435 compared the test "predictor" scores of race-identified candidate subgroups with independent measures of job performance, or criterion scores, for the same subgroups. See discussion pp. 2-3, *ante.* The results of the statistical comparisons disclosed that whites with the same measured job performance (criterion scores) as their minority counterparts received higher predictor scores and thereby, an enhanced likelihood of appointment as Correction Sergeants. See discussion pp. 3-4, *ante.* Had the examination been used without modification, it would have included an inherent and irrelevant racial bias, i.e., whites would be appointed in preference to minorities because of the whites' higher predictor scores when the minorities' criterion scores demonstrated that they could do the job as well as the whites so appointed. *Ibid.*• The 250 point fairness revision eliminates the discrepancy between minority predictor and criterion scores with the purpose and effect of making the test scores of both whites and minorities equally accurate predictors of successful job performance. See Guidelines § 1607.14B(8) (d) (App. M-5 to M-6), opinion below, App. A-6 to A-9, and discussion p. 4 *ante.* The result of a racially neutral selection procedure (opinion below, App. A-6) literally based on demonstrable measures of job performance well within the principles established by *Bakke, Albermarle* and *Griggs.* Indeed, as the opinion below recognizes (App. A-8 to A-9), had the state respondents failed to

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• Petitioners advocate exactly this biased result in asking the Court to grant plenary consideration in order to preclude further use of the fairness technical standard in criterion validity studies. See Petition, pp. 17-23 and discussion pp. 2-3, *ante.*

make the fairness revision, examination number 36-435 would be invalid. Since criterion validity depends on significant correlations between test and job performance measures, a significant correlation between test score and racial identity once found, must be corrected (or shown to be job-related, a demonstration never made by petitioners), or the test results will be skewed by variables unrelated to successful job performance. *Ibid.*

Examination number 36-435, as revised for fairness, provides equal employment opportunities for whites and minorities with the same measured job performance. See discussion pp. 3-4, 5-6, *ante.* Unlike racial quotas or preferences, minority candidates with revised test scores do not obtain opportunities for appointment in disregard of their own skills or those of white candidates, and they are not guaranteed appointments equal to, or in proportion with, whites. Opinion below, App. 6, A-7. Compare Petition, pp. 18, 22. Both candidate groups earn their positions on the eligible list in the same way, by obtaining examination scores which are the most accurate predictors of job success possible, and no one group, or candidate, "bumps" another. Opinion below, App. A-7 to A-8 and discussion pp. 2-4, 5-6, *ante.* Compare Petition, pp. i (Question Presented), 24, 26. Of perhaps greater significance, the fairness inquiry is not minority oriented, i.e., all race and sex-identified candidate subgroups must be considered, and a 'white' 'male' subgroup is entitled to a revision in scores in the same manner as a 'black' 'female' subgroup upon a technically sufficient showing of a disparity between test and job performance measures. Nor does fairness involve *a priori* judgments about the appropriate racial make-up of an employer's work force. Compare *Fullilove* v. *Klutznick,* —— U.S. ——, 100 S. Ct. 2758 (1980), approving federal requirement that ten percent of federal funds provided for state and local public works be earmarked

for minority owned enterprises; *United Steelworkers of America* v. *Weber,* 433 U.S. 193 (1979), approving private, voluntary affirmative action plan with proportional minority hiring and promotion goals and seniority preferences; *Minnick* v. *California Department of Corrections,* 95 Cal. App. 2d 506, 157 Cal. Rptr. 260 (1979), *cert. granted* —— U.S. ——, 65 L. Ed. 2d 1139 (1980), approving state affirmative action plan with proportional minority hiring and promotion goals and requiring the sex and race of essentially equally qualified candidates to be considered in making discretionary appointments from eligible lists.*

The outstanding orders in this case requiring examination number 36-435 to be criterion valid (and fair) under the Guidelines preclude the *de novo* consideration of the alternative application of equal protection and Title VII standards that petitioners request. Petition, pp. 23-26. See Opinion below, App. A-6 n.2; Brief In Opposition for the Kirkland respondents, pp. 3-4 and discussion p. 8

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* Even if the fairness revision for examination number 36-435 were considered a minority preference, plenary consideration is foreclosed by the cited cases. First, the development and administration of examination number 36-435 as a criterion valid selection procedure (with the related fairness inquiry, see discussion pp. 2-3, *ante*) complied with prior orders in this case intended to remedy the racial discrimination inherent in the previous permanent selection procedure for Correction Sergeant. See July 31, 1974 district court decree, 8 EPD ¶ 9675 (App. F), *aff'd in part, rev'd in part* 520 F.2d 420 (2d Cir. 1975) (App. H); August 3, 1975 order on remand (App. I) and Brief in Opposition for the Kirkland respondents, pp. 6-9. It is therefore subject to less demanding judicial scrutiny than the voluntary programs approved in *Fullilove* and *Weber.* See e.g., *Weber, supra,* at 211-16 (BLACKMUN, J. concurring). Second, the 'preference' affected by the fairness revision is *de minimis* in comparison to *Fullilove* and *Weber.* The 250 point addition (of a total of 8,830 points available on the examination) is an approximate three percent differential in favor of minority candidates, an increment which the Court of Appeals refused to find "substantial" as a matter of law. Opinion below, App. A-13.

footnote. Moreover, the racial neutrality of the examination, as revised for fairness, necessarily satisfies even the most searching equal protection scrutiny. If viewed as a minority preference, *Fullilove* forecloses further consideration. The Court there found state action in aid of minority preferences far more substantial to be constitutionally permissible.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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